Supreme Court, U.S.
FILED

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No. OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

HOLOCAUST SURVIVORS FOUNDATION USA, INC., *ET AL.*,

Petitioners,

v.

UNION BANK OF SWITZERLAND, *ET AL.*,

Respondents.

(A complete list of the parties continues on the inside cover)

On Petition for Writ of Certiorari
to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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Dated: April 3, 2006

Continuation of Caption

Additional Petitioners are:

G.K., a Holocaust Survivor and member of the New American Jewish Club of Miami, L.K., a Holocaust Survivor and member of the New American Jewish Club of Miami, F.K., a Holocaust Survivor and member of the New American Jewish Club of Miami, David Schaecter, individually and as President of the Holocaust Survivors Foundation-USA, Inc., Leo Rechter, individually and as President of the National Association of Jewish Holocaust Survivors {NAHOS}, National Association of Jewish Holocaust Survivors, David Mermelstein, Individually and as President of the New American Jewish Club of Miami and President of the South Florida Holocaust Survivors Coalition, New American Jewish Club of Miami, South Florida Holocaust Survivors Coalition, Alex Moskovic, individually and as Co-President of the Child Survivors/Hidden Children of the Holocaust, Inc., Child Survivors/Hidden Holocaust Survivors, Fred Taucher, individually and as President of the Survivors of the Holocaust Recovery Project {SHARP}, Survivors of the Holocaust Recovery Project {SHARP}, Nesse Godin, individually and as President of the Jewish Holocaust Survivors and Friends of Greater Washington, Jewish Holocaust Survivors and Friends of Greater, Henry Schuster, individually and as President of the Holocaust Survivors Group of Southern Nevada, Holocaust Survivors Group of Southern Nevada, Herbert Karliner, individually and as a member of the Holocaust Survivors Foundation-USA, Inc. and the South Florida Holocaust Survivors Coalition, Lea Weems, individually and as President of the Houston Council of Jewish Holocaust Survivors, Houston Council of Jewish Holocaust Survivors, Sam Gasson, individually and as President of the Habonim Cultural Club, Survivors of the Holocaust, Habonim Cultural Club, Survivors of

the Holocaust, Holocaust Survivors of South Florida, Dena Axelrod, individually and as a member of the Child Survivors of the Holocaust, South Florida Group and the South Florida Holocaust Survivors Coalition, Saul Birnbaum, individually and as President of the Holocaust Survivors Club of Baca Raton {Century Village}, and the Holocaust Survivors Club of Boca Raton{Century Village}.

Appellants below.

Additional Respondents are:

Union Bank of Switzerland, Swiss Bank Corp., also known as Swiss National Bank, Banking Institutions #1-100, John Does #1-100, Certain Swiss Bank Accounts described as follows, Swiss Bankers Assoc., Swiss Bankers Association, Bank of International and Bank of International Settlements,

Defendants-Appellees below,

Judah Gribetz,

Special Master below,

Gizella Weisshaus, on behalf of herself and all other persons of all national origins, ethnic groups, races, creeds and colors, similarly situated as victims and survivors of the Nazi Holocaust and Jacob Friedman,

Plaintiffs below,

World Jewish Restitution Organization, South Florida Holocaust Coalition and Thomas Weiss,

Intervenor-Plaintiffs below,

Washington State Insurance Commissioner, Gregory Tsvilichovsky, Matvey Yentus, Sofiya Bloshteyn, Olga Tsvilikhovskya, Larisa Ryabaya, Rosa Yentus, Pavel Aronov, Lubov Starodinskaya, Eliazar Bloshteyn, Plaintiff's Executive Committee Settlement Class,

Interested-Parties below,

Polish American Defense Committee, Inc., a non-profit California Corporation, Irving Wolf, Disability Rights Advocates and Director of International Affairs and Representa,

Movants below,

Pink Triangle Coalition, Karl Lange and Pierre Seel,

Interested Parties-Cross-Appellants below.

Miriam Rubin, Individual Holocaust Survivor, Doris Fedrid, Individual Holocaust Survivor, Helga Gross, Individual Holocaust Survivor, National Federation of the Blind, USA, German Council of Centers for Self-Determined Li, Finist, Russia, Equal Ability Limited, United Kingdom, Through the Looking Glass, USA, Disabled Persons International, Canada, World Institute on Disability, USA, Center for Independent Living, Bulgaria, Disability Rights Education and Defense Fund, US, Center for Independent Living, Berkeley. USA, California Foundation for Independent Living Cen, Independent Living Resource Center San Francisco, Computer Technologies Program, USA, Ragged Edge/Avacado Press, USA, Legal Advocacy for the Defense of People with Di, National Confederation of Disabled Persons, Greece and De juRe Alapitvany, Hungary,

Other Appellants below.

QUESTIONS PRESENTED

This petition arises out of several historic class action suits brought by Holocaust survivors against Swiss banks that, among other things, assisted in laundering and concealing assets looted by the Nazis and misappropriated deposits made by persons who later fell victim to the Nazis. The case was settled for a combined $1.25 billion, to be allocated among five separate certified classes of Holocaust victims, including the "Looted Assets Class" at issue here. Class members were required to decide whether to opt-out of the settlement prior to being told how Settlement funds would be allocated either between or within different classes. After the opt-out period, the district court concluded that individualized claim determinations would be impracticable and that it would instead endorse a *cy pres*, or "next best," allocation approach. It rejected a *pro rata* allocation among class members and approved a distribution by country, whose signal feature was that 75% was earmarked for the Former Soviet Union (FSU), where a relatively small portion of the class resides. That division was allegedly based on financial need unrelated to differences in the claims of class members.

Petitioners are Holocaust Survivors and *bona fide* groups of Survivors who are members of the Looted Assets Class and live in the United States. U.S. Survivors constitute 30% of all class members but were allocated only 4% of the Looted Assets Class funds based on the district court's view of their relatively less pressing financial need. The questions presented by this petition are:

1. Whether the settlement violates the intra-class equity requirements of Federal Rule of Civil Procedure 23 and the Due Process Clause by discriminating among class members with common claims and injuries, based on factors unrelated to such claims or injuries, and denying U.S. Survivors consideration for the release of their claims.

2. Whether the settlement violates U.S. Survivor class members' rights under Rule 23 and the Fifth and Seventh Amendments because their claims were compromised for no consideration, and they did not learn that fact until after the opt-out deadline had passed.

3. Whether Lead Class Settlement Counsel's acquiescence in a distribution adverse to the overwhelming majority of the class, under the structural framework of this case, constituted inadequate representation.

PARTIES TO THE PROCEEDINGS BELOW

The parties to this petition are listed in the caption of the case along with the description of their postures below other than the two parties listed on the cover. As to those two parties, petitioner Holocaust Survivors Foundation USA, Inc. was an Appellant below and participated in the district court proceedings as a representative of the groups of class-members at issue in this petition, and respondent Union Bank of Switzerland was an Appellee in the Second Circuit and a defendant in the district court.

The nongovernmental organizations and corporations who are petitioners are not-for-profit entities and have no stock; therefore no parent or publicly held companies own 10% or more of their stock.

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

While this case has generated a host of decisions and opinions, the ones relevant to this petition are as follows:

The district court's August 2, 2000 decision approving the fairness of the Settlement prior to any allocation determinations is published at 105 F. Supp.2d 139 and is reproduced herein as Appendix B (B1-B51). The district court's Novem-

ber 22, 2000 decision adopting the Special Master's allocation of Settlement funds is not reported but is available at 2000 WL 33241660 and is reproduced herein as Appendix C (C1-C7). The Second Circuit's July 26, 2001 affirmance of the fairness of the settlement amount and the allocation plan against a different set of challenges brought by other class members is published at 413 F.3d 183 and is reproduced herein as Appendix D (D1-D5).

The district court's September 25, 2002 order adopting the allocation plan for a supplemental distribution of funds to the Looted Assets Class is unpublished but is reproduced herein as Appendix E (E1-E5). The district court's November 17, 2003 order adopting the allocation plan for a further supplemental distribution of funds to the Looted Assets Class is unpublished but is reproduced herein as Appendix F (F1-F5). The district court's March 9, 2004 decision explaining its reasons for rejecting petitioners' objections to and denying motions for reconsideration of the supplemental allocation orders is published at 302 F. Supp.2d 89 and is reproduced herein as Appendix G (G1-G54).

The district court's September 13, 2004 decision explaining the role of Lead Class Counsel in providing an adversarial defense on appeal of the district court's decisions as against objecting class members is not reported but is available at 204 WL 3710212 and is reproduced herein as Appendix H (H1-H4).

The Second Circuit's September 9, 2005 decision affirming the district court's allocation decisions is published at 424 F.3d 132 and is reproduced herein as Appendix A (A1-A30). The Second Circuit's January 3, 2006 denial of rehearing and rehearing *en banc* is not reported but is reproduced herein as Appendix I.

JURISDICTION

The Second Circuit issued its Opinion on September 9, 2005. Petitioners moved for rehearing and rehearing *en banc*,

which were denied on January 3, 2006. This Court has jurisdiction to hear this petition pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This petition raises federal questions arising under the Fifth and Seventh Amendments of the United States Constitution and Federal Rule of Civil Procedure 23. The particular provisions of Rule 23 at issue are Rule 23(a)(4): "One or more members of a class may sue or be sued as representative parties on behalf of all only if . . . (4) the representative parties will fairly and adequately protect the interests of the class;" Rule 23(c)(2)(B): "For any class certified under Rule 23(b)(3), the court must direct to class members the best notice [which] must concisely and clearly state in plain, easily understood language: . . . that the court will exclude from the class any member who requests exclusion, stating when and how members may elect to be excluded; and the binding effect of a class judgment on class members under Rule 23(c)(3); Rule 23(e)(1)(A): "The court must approve any settlement, voluntary dismissal, or compromise of the claims, issues, or defenses of a certified class;" Rule 23(e)(1)(B): "The court must direct notice in a reasonable manner to all class members who would be bound by a proposed settlement, voluntary dismissal, or compromise;" and Rule 23(e)(1)(C): "The court may approve a settlement, voluntary dismissal, or compromise that would bind class members only after a hearing and on finding that the settlement, voluntary dismissal, or compromise is fair, reasonable, and adequate."

The Fifth Amendment to the United States Constitution provides in relevant part: "No person shall be . . . deprived of life, liberty, or property without due process of law . . . ." The Seventh Amendment to the United States Constitution provides: "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved."

STATEMENT OF THE CASE[1]

1. This case involves the distribution of funds paid by various Swiss banks and others in settlement of claims by several classes of victims of Nazi persecution and Swiss-bank complicity. The case settled for $1.25 billion, to be distributed among five separate certified classes of claimants:

(A) "Deposited Assets Class" (Nazi persecution victims seeking assets deposited with Swiss financial institutions);

(B) "Slave Labor I Class" (those forced to work as slave laborers for German entities);

(C) "Slave Labor II Class" (same for Swiss entities);

(D) "Refugee Class" (those mistreated when they sought entry into Switzerland or after being admitted); and

(E) "Looted Assets Class" (persecution victims seeking to recover the value of looted or so-called "cloaked" assets), of which petitioners are members.

This petition involves only the Looted Assets Class of claimants and the distribution of settlement funds allocated to that class. Petitioners are Holocaust Survivors and members of the Looted Assets Class who reside in the United States.[2] The essence of petitioners' objections to the allocation is that Looted Assets Class members with identical legal claims have been treated unequally in the allocation of settlement funds because the courts below submerged the interests of class members and of the class as a whole in order to benefit a

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[1] Unless otherwise noted, the facts are taken from the Second Circuit's decision below, attached as Appendix A.

[2] Petitioners include *bona fide* Survivor groups such as the Holocaust Survivors Foundation USA, Inc., a 501(c)(3) organization formed to give Survivors in the U.S. a united voice in restitution and distribution matters with particular concern for the home and health care needs of poor survivors. JA 7206 ("JA" refers to the Joint Appendix in the Second Circuit).

subset of the class that the courts deemed more deserving based, not on the different quality of their claims or their injuries, but rather on their current "need" unrelated to any differences in their claims. As a result, the vast majority of U.S. Survivors in the Looted Assets Class were denied any benefit in the settlement for the release of their claims. Petitioners also object to the procedural unfairness of being required to make their opt-out decisions prior to being informed of an allocation scheme that leaves most U.S. class members with no recovery whatsoever yet requires them to forfeit their claims in the settlement, and to the inadequate representation provided by Lead Plaintiffs' Settlement Counsel.

2. Three class action lawsuits were brought by Holocaust survivors in 1996 and 1997 alleging that Swiss banks knowingly retained and concealed the assets of Holocaust victims who had been persecuted by the Nazi regime by genocide, systematic looting of personal and business property, and slave labor.

In August 1998, the parties announced a settlement in principle to pay $1.25 billion for the benefit of the various plaintiff classes. As noted above, the Settlement created five separate certified classes of beneficiaries, with the Looted Assets Class being the one relevant here.

3. On March 29, 1999, the district court preliminarily approved the proposed settlement, certified the five settlement classes, and approved the Notice with an October 29 opt-out date. JA 4944, JA 5024. On March 31, 1999, the district court appointed a Special Master to recommend an allocation of settlement funds to and among the five settlement classes and provided that the Special Master would circulate a proposed plan of allocation and distribution for comment *after* the opt-out deadline. JA 5028, 5047.

The District Court specifically declined to appoint separate counsel for each of the five recommended classes of

Survivors. *See* JA 4944. Instead, Lead Counsel recommended, and the Court adopted, a "unique" mechanism whereby Class Counsel (most of whom were supposedly working "pro bono") would represent the "entire class" in connection with the settlement and allocation process.[3]

In its August 2, 2000 opinion approving the Settlement, the district court discounted concerns over Class Counsel's "divided loyalty," noting that "[k]ey members of the plaintiffs' Executive Committee who negotiated this settlement are providing their services on a *pro bono* basis," App. B 10, and arguing that the use of a Special Master for allocation and distribution recommendations obviated concerns over adequate representation "because the class members *represent themselves* on this key issue, and have direct access to the Special Master and to me." App. B18 (court's emphasis).

The district court similarly rejected the argument that the failure to disclose how settlement funds would be allocated among and within classes rendered the notice and opt-out period inadequate. The court offered the non-sequitur observation that it would be

> virtually impossible to provide specific information to individuals about their *precise* recovery prior to the completion of the elaborate claims processes contemplated by the Settlement Agreement, and under consideration by the Special Master.

App. B19 (emphasis added). It then defended having denied class members even the general outlines of the allocation plan prior to the close of the opt-out period by noting that "all class

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[3] Two months after the Second Circuit affirmed the District Court's allocation, Lead Plaintiffs' Settlement Counsel Burt Neuborne, one of the "pro bono" attorneys referenced by the district court, applied for $4.1 million in fees for a seven year period which included the periods in which the Looted Assets Class allocations were under consideration. *See* William Rashbaum, "Lawyer's $4.1 Million Fee Angers Holocaust Survivors," *The New York Times*, February 25, 2006.

members have been informed of this [bifurcated] process" whereby allocation of funds would be decided later and could have opted out of the process and the settlement. App. B20.

4. On September 11, 2000, the Special Master published his Proposed Plan of Allocation and Distribution.[4] The Proposal called for the allocation of $800 million from the $1.25 billion settlement fund to the Deposited Assets Class, with a notation that much of this fund would likely be unclaimed and need to be reallocated. JA 5698 at 3, 11-12, 15. His report also, for the first time, announced that the Looted Assets Class funds would be limited to $100 million ($90 million for Jewish survivors, $10 million for non-Jewish survivors), and would be distributed through social service agencies according to *cy pres*[5] principles over a ten-year period.[6]

As a basis for distributing the $90 million earmarked for Jewish victims, the Special Master proposed a geographical plan of allocation which called for 75% of all moneys to be spent to assist class members in the former Soviet Union ("FSU"), 12.5% to assist class members in Israel, and the remaining 12.5% for survivors in the rest of the world (including the United States) in amounts to be determined by a non-

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[4] The Special Master published his plan thirty-three days after the Fairness decision, three days after the deadline to appeal the fairness decision.

[5] *Cy pres* is an equitable doctrine to carry out "as near as possible" an objective which cannot be given literal effect. BLACK'S LAW DICTIONARY 269 (6th abridged ed. (1991)). Its utilization has long been and continues to be an accepted methodology for allocating funds received in a class action settlement for the benefit of class members. *In re Agent Orange Prod. Liab. Litig. MDL No. 381*, 818 F.2d 179, 185 (2d Cir. 1987), *cert. denied*, 487 U.S. 1234 (1988); *Mirfasihi v. Fleet Mortgage Corp.*, 356 F.3d 781, 784 (7th Cir. 2004).

[6] At the time of the class notice in May 1999, Class Counsel had represented that "no subset or segment of Class member is privileged over any other . . . [and] none are excluded from relief or consigned to inferior benefits." JA 5208, 5230. This proved untrue when the Special Master published his allocation plan.

governmental organization ("NGO"). The explanation for this plan was that FSU class members were the "neediest" members of the Looted Assets Class, due in large part to demographic, political and historical events and the economic problems caused by the collapse of communism. DE 719 at 25-26; *also id.* at 23, 26, 115, 117-18, 120, 122-35. The result of this allocation scheme is that groups serving class members in the United States received 4% of the funds even though U.S. Survivors represent 30% of the class and 20% of the world's survivor population.[7]

After initial publication of the Special Master's proposal, a number of U.S. Holocaust survivors (including several of the petitioners) objected, urging that the funds be allocated in proportion to the current residence of all class members. Nonetheless, on November 22, 2000, the district court approved the Special Master's plan in its entirety. App. C4.

U.S. Survivors and survivor groups from New York, California, and Florida appealed, raising a variety of challenges to the virtual exclusion of U.S. Survivors from the funds compensating for looted property, and to the process that led to such exclusion. JA 5976.

While the appeal was pending, the district court initiated a meeting with counsel for the U.S. Survivors and Lead Settlement Counsel. The court asked the U.S. Survivors to withdraw their appeals because he feared delays would harm needy FSU survivors. Counsel for the U.S. Survivors explained that virtually all U.S. Survivors would be denied any compensation under the allocation, despite the pressing needs of his elderly clients. Eventually Lead Settlement Counsel agreed in writing on May 15, 2001 to support an increased allocation to the U.S. Survivors in subsequent distributions

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[7] The NGO allocated $193,000 for survivors in the United States out of $10 million distributed in the first year. Over the first three years of allocations, the total amount disbursed to U.S. social service agencies averaged 4% of the total Looted Assets Class funds distributed each year.

"to assure that the needs of the American survivor community are addressed, with resources *in a fair proportion to their overall numbers, and with due regard for the fact that they have not received significant allocations up to this point.*" JA 6084 (emphasis added). With that promise of direct support from the Plaintiffs' Lead Settlement Counsel, the U.S. Survivors withdrew their appeals of the initial fairness and allocation orders.[8]

5. In August 2002 and October 2003, the Special Master recommended an additional $105 million to be distributed for the benefit of the Looted Assets Class, but in the same geographic proportions as in the first distribution.

Petitioners objected to the Special Master's recommendations and urged a distribution more aligned with the current population of survivors around the world. JA 7031. Petitioners argued that a reallocation of such future distributions in accordance with survivor population rather than alleged "relative need" would address the improper disparate formula used to that point and would provide desperately needed aid to elderly class members in the U.S, Israel, and elsewhere.[9]

The district court adopted the Special Master's recommendations in two separate orders, on September 25, 2002 and November 17, 2003. App. E, F. Petitioners moved for rehearing under Rule 59 as to both orders.

On March 9, 2004, the district court entered an omnibus order approving the Special Master's allocation formula, rejecting petitioners' procedural and substantive objections and

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[8] Under the Special Master's Proposal, approved by the district court, each subsequent allocation must be independently justified and hence is independently appealable. This petition arises from the appeal of two subsequent allocation orders.

[9] Contrary to his promise in May 2001, Lead Settlement Counsel failed to support such adjusted allocations, even though he had "no quarrel" with the U.S. Survivors' assessment of needs in this country and conceded that such needs were greater than was previously assumed. JA 6994.

Rule 59 motions, and, remarkably, also holding that the U.S. Survivors lacked standing either individually as class members, or through their incorporated 501(c)(3) membership organization, to object to allocations adverse to their interests. App. G.

6. On appeal, the Second Circuit affirmed. App. A.[10] The court rejected petitioners' arguments regarding the improper use of a need-based formula unrelated to class claims in the *cy pres* allocation and also rejected petitioners' arguments regarding the procedural flaws in the settlement and class representation process. Regarding the *cy pres* allocation, the court of appeals recognized that,

> in a traditional class action brought to remedy an injury that had occurred shortly before the initiation of suit, the amounts allocated among claimants would normally vary primarily by the effect of the injury upon different claimants. But in the circumstances presented by this case, we think the equitable principles of the *cy pres* doctrine permit the geographic variation that the District Court adopted. . . .

App. A25.

Petitioners sought rehearing and rehearing *en banc*, both of which were denied. App. I.

This petition for certiorari followed.

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[10] The Second Circuit rejected challenges to petitioners' standing, finding that because at least one appellant, "G.K.," was a poor U.S. Survivor in need of medical assistance who would benefit from a reversal of the allocations below, standing was not an obstacle to its decision on the merits. It declined to address Appellee's arguments that *all* individual class members and *bona fide* Survivor membership organizations lacked Article III and prudential standing to object to or appeal the *cy pres* allocations.

The court of appeals did not address Appellee's argument that the U.S. Survivors' challenges were foreclosed by the withdrawal of their appeal of the initial allocation.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted because the decision below disregards the specific and individual rights of class members to be treated equally with respect to equal claims regarding looted assets, contrary to the decisions of this Court and others requiring intra-class equity and forbidding settlements that deny class members any consideration for the release of their claims. Indeed, the inequitable results are all the more disturbing for having been sprung on the U.S. members of the Looted Assets Class after they had erroneously placed their faith in the courts and after the opt-out period had ended. That the court of appeals condoned such a process and result in a case of such historic significance, dealing with foundational issues of trampled rights of Holocaust victims and survivors, unique and rapidly dwindling class populations, and internationally significant concerns, only heightens the need for review by this Court to assure adherence to the rule of law rather than the social policy predilections – no matter how well-intended – of judges.

I. THE ISSUES PRESENTED ARE OF NATIONAL IMPORTANCE.

To say the issues in the case are of national importance is to grossly understate the matter. Although addressing only one segment of the monumental and vast crimes perpetrated by the Nazis and those with whom they dealt, the events underlying this case arose from perhaps the largest systematic theft in history – the looting of the property and assets of countless victims of Nazi persecution. The Swiss banks that aided and abetted such grotesque thievery by laundering and concealing looted assets have now provided settlement funds for at least a partial restitution for such stolen property. The final disposition of that historic settlement according to the rule of law, rather than through unbridled judicial discretion – however charitable and well-meaning it may be – will reflect

on both the judicial system and the Nation and is thus of tremendous practical, legal, and moral importance.

While petitioners do not deny the tidal pull of wanting to solve a deep and pressing need such as that of the Holocaust survivors in the FSU, this case is not about solving that need or otherwise comprehensively balancing the scales regarding the colossal and varied wrongs of the Holocaust and its aftermath. Rather, it is about at least partially remedying a particular class of wrongs around which the courts can wrap their hands and apply the law: the theft and concealment of property from all members of the Looted Asset Class. While the partial restitution provided by the settlement fund in this case certainly could do much good if put to other uses, it is ultimately up to the rightful owners (the class members) – not a special master, district court, or court of appeals – to make the hard choices brought on by endless need and limited resources.

The supervision of a large class settlement simply does not empower a court to freelance on broad issues of social justice, relative need, or the historic burdens of having been on the wrong side of the Iron Curtain after World War II. Rather, courts are empowered only to remedy the specific legal wrongs in the cases before them. And in class actions, that requires treating equally class members with equal legal claims and injuries, regardless of unrelated differences in circumstances or need. That is the essence of the rule of law, it is required by Rule 23 and the Due Process Clause, and it is vital that such principles be scrupulously applied in a case of this magnitude and importance.

Indeed, the total settlement of $1.25 billion was one of the largest in history, and the portion allocated to the Looted Assets Class is the largest "*cy pres*" fund in the history of the U.S. court system – exceeding $200 million. And, the fund is expected to reach $500 or $600 million by the time the last

dollar is distributed.[11] With so much at stake, the issues presented here are of considerable importance and warrant this Court's attention.

Finally, this Court's involvement now, rather than later, is particularly important given that prior distributions of the fund cannot be recouped and hence for the fund as a whole to be properly distributed, the Court must act concerning the supplemental distributions – such as those challenged here – so that those and expected future distributions will be allocated according to the correct legal principles. There is still time to remedy the improper distribution scheme applied below, but given the continued spending of the funds and the advanced ages of Holocaust survivors, it is essential to address those issues now.

II. THE SECOND CIRCUIT ERRED IN AFFIRMING DISTRIBUTION OF LOOTED ASSET CLASS FUNDS UNEQUALLY WITHIN THE CLASS BASED ON CRITERIA WHOLLY UNRELATED TO THE CLAIMS AT ISSUE.

Having rejected individualized determinations and *pro rata* allocation, the district court held that among the distribution choices, the "more reasonable alternative" would be "targeting the neediest survivors in the Looted Assets Class . . . as the way to most benefit the class as a whole" because (i) compensation efforts since the end of the war have provided less to those survivors in the FSU than to survivors in the United States, (ii) Survivors in the FSU had to suffer through decades of Communism, (iii) Survivors in the U.S. have more "family and community support networks" than

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[11] According to Class Counsel Robert A. Swift, if the $205 million fund were a private foundation, it would be the 68th largest in the United States. With the *current level* of assets distributed over a 10 year period, it would be the 53rd largest foundation in the United States based on annual expenditures. (Swift Second Circuit Brief, citing www.fdncenter.org/research/trends).

those in the FSU, and (iv) the economic plight of Survivors in the U.S. is "less pressing". App. G13-16.

The court of appeals followed the district court's lead and relied on *In re "Agent Orange" Product Liab. Litig.*, 818 F.2d 145 (2d Cir. 1987) to justify the allocation below.

According to the court of appeals, it had "previously approved a district court's allocation, pursuant to the *cy pres* doctrine, of settlement funds to those class members 'most in need of help.'" App. A15, n. 10 (citing *Agent Orange*, 818 F.2d at 158). But, the "need" to which the trial court in *Agent Orange* referred was purely a description relating to the *extent of injury* presumably suffered by plaintiffs from possible Agent Orange exposure. Indeed, the *Agent Orange* court *excluded* benefits to class members where the veteran's death or disability had extraneous causes, such as traumatic injury unrelated to Agent Orange exposure, thus illustrating that the "need" at issue there was a proxy for injury, not a free-floating equitable consideration.[12] The "need" relied on in this case, of course, has nothing to do with any differential injury *from* Nazi looting or Swiss complicity, but is merely the result of happenstance and geography, as the courts below candidly recognize.

While the Second Circuit below agreed that the factors used here were unprecedented, it upheld them nonetheless:

> Appellants further contend that the District Court exceeded its discretion because "[n]o court" has previously allocated settlement funds by consulting the same "factors" the District Court applied here. . . . The "factors"

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[12] The *Agent Orange* trial court also rejected a proposal that would have calibrated benefits based on victims' other sources of assistance such as governmental benefits, private insurance, and family support. These important aspects of the allocation were noted in the Second Circuit's *Agent Orange* opinion, 818 F.2d at 157-58, confirming that "need" in general has never been considered a valid basis for distinguishing among class members.

> in question include the history of previous compensation efforts, material deprivations associated with decades of life under a Communist regime and the effects of that regime's collapse, and access to family and community support networks. . . . . Like appellants, we are unaware of any other court that has relied on this particular combination of factors in allocating settlement funds. But unlike appellants, we believe that consideration of these factors, in the circumstances presented, was entirely appropriate and well with the wide discretion afforded to the District Court.

App. A26.

But district court discretion is not unlimited, and does not encompass using legally improper factors such as general "need" to discriminate among class members or approving allocations that deny some class members any benefits in consideration for their release of claims.

A. This Court and Others Forbid Intraclass Disparities Based on Factors Unrelated to Plaintiffs' Claims.

The class certified in this case is defined as victims or targets of Nazi persecution (and heirs, etc.) who have or will assert claims against Swiss banks or companies "relating to or arising in any way from looted assets or cloaked assets." App. B6. As defined, there is no distinction among Looted Assets Class members by reason of any post-Holocaust socio-economic circumstances.

But it is bedrock class-action law – whether under Rule 23 or the Due Process Clause – that class members with the same claims and legal injuries must be treated the same, and there can be no discrimination among class members unrelated to differences in their claims or injuries themselves. By focusing on the extrinsic circumstances of differential economic need unrelated to differences in claims, the courts below ran

afoul of those basic principles and of numerous cases from this and other courts.

For example, in *Ortiz v. Fireboard Corp.*, 527 U.S. 815, 855, 863, 864 (1999), this Court reversed the settlement structure and remedy approved by the lower courts in part because "the distribution of the fund among class members" failed the test of intra-class equity. *Id.*, at 841. Looking to the antecedents of mandatory class actions, this Court observed that "the simple equity of a *pro rata* distribution provid[ed] the required fairness." *Id.*; *see also Staton v. Boeing Co.*, 327 F.3d 938 (9th Cir. 2003) (reversing settlement allocating 51% of monetary award to small portion of the class because "singling out a large group of non-named class members for higher payments without regard to the strength of their claims eliminates a critical check on the fairness of the settlement for the class as a whole."); *In re General Motors Corp. Pick Up Truck Fuel Tank Products Litig.*, 55 F.3d 768, 808 (3rd Cir. 1995) ("one sign that a settlement may not be fair is that some segments of the class are treated differently than others."; "[T]he fact that the coupon settlement benefits certain groups of the class more than others suggests that the district court did not adequately discharge its duties to safeguard the interests of the absentees"), *cert. denied sub nom. General Motors Corp. v. French*, 516 U.S. 824 (1995); *Holmes v. Continental Can Co.*, 706 F.2d 1144, 1148 (11th Cir. 1983) (reversing allocation of half the back pay award to eight named plaintiffs where there was no proof such disparity was justified by their unique, individual claims); *Petruzzis, Inc., v. Darling-Delaware Co.*, 880 F. Supp. 292, 299 (M.D.Penn. 1995) (rejecting class settlement because all class members' claims against defendant were "analytically indistinguishable" but only 50% of them were eligible for certificates; "the same type of injury was purportedly sustained by all class members and all class members have the same rights of recovery against [defendant]. Thus while disparate treatment of class members maybe justified by a demonstration that the favored

class members have different damage claims or greater damages, . . . no such demonstration has been made here.").

That the district court felt the need to use a *cy pres* distribution mechanism rather than individualized damage determinations or a pro rata distribution does not justify abandoning the basic principles of intra-class equity. Even if it is impossible to give each and every class member an equal but meaningful[13] recovery, the "next best" approach of equity would still provide class members with an equal *opportunity* to participate in the benefits of the recovery. At a minimum, the next best scheme must benefit the class as a whole, not merely a subset of the class. Here, the class as a whole was not benefited, and the allocation bore no relation to the relative loss of property as between class members being treated differently. *See Six Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1305, 1308 (9th Cir. 1990) (reversing a *cy pres* class allocation; "Even where *cy pres* is considered, it will be rejected when the proposed distribution fails to provide the 'next best' distribution."; "Fluid or *'cy pres'* distribution avoids [the problems of small recoveries that are economically unfeasible to distribute to numerous individual class members] by permitting . . . distribution of unclaimed funds to indirectly *benefit the entire class.*") (emphasis added); *In re Airline Ticket Comm'n Antitrust Litig.*, 268 F.3d 619, 626 (8th Cir. 2001) (in class action against airlines by travel agents who sold tickets throughout the U.S., *cy pres* allocation to two Minnesota-based groups reversed for a distribution "more closely related to the origin of this nationwide class action case).

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[13] Given that *any* resolution of the claims against the Swiss banks would provide only partial recovery of the assets plundered by the Nazis in total, a fully meaningful – as in "complete" – recovery was never in the cards. But that is not to say that even modest sums distributed to individuals would lack meaning *to them*.

B. This Court and Other Circuit Courts Forbid Settlements Which Deny Class Members Consideration for the Release of Claims.

The error of intra-class discrimination endorsed by the courts below is further compounded by the fact that for most U.S. members of the Looted Assets Class, their rights against the Swiss banks will have been compromised for no consideration whatsoever. Given the exceedingly low relative amounts allocated to agencies for use within the United States, even most of the poorest U.S. class members will have no realistic opportunity to receive benefits, and the remainder of the class in the U.S. will surely get nothing. Such a result conflicts with numerous cases rejecting the notion that class members can be forced to surrender their claims in return for nothing at all. *See Ortiz*, 527 U.S. at 860-61; *Amchem Products, Inc., v. Windsor*, 521 U.S. 591, 612 (1997) (Rule 23 "must be interpreted in keeping with the . . . Rules Enabling Act, which instructs that rules of procedure 'shall not abridge, enlarge, or modify any substantive right. 28 U.S.C. Section 2072(b)"); *Mirfashi v. Fleet Mortgage Corp.*, 356 F.3d 781, 783-785 (7th Cir. 2004) (Posner, J.) (reversing settlement where one of the classes "received absolutely nothing, while surrendering all of its claims against" the defendant); *Molski v. Gleich*, 318 F.3d 937, 955 (9th Cir. 2003) (*cy pres* damages remedy reversed because consent decree released almost half the absent class members' claims with little or no compensation); *In re General Motors Corp. Pick Up Truck Fuel Tank Products Litig.*, 55 F.3d at 808 (reversing coupon settlement in a case which likely provided no value to many class members, including lower income class members); *Piambino v. Bailey*, 610 F.2d 1306, 1329 (5th Cir. 1980) (invalidating settlement as to class members who received no payments from the settlement fund); *In re Ford Motor Co. Bronco II Prod. Liab. Litig.*, 1995 WL 222177 (E.D.La 1995) (settlement disapproved because claims of plaintiffs who no longer drove

Broncos would be extinguished for safety information of little or no value to them.).

In *Mirfashi*, even where there was a considerable disparity in injury between two subclasses and even where a *per capita* distribution would have been less than 20 cents per person, the Seventh Circuit still overturned the settlement because "[t]he members of the [more injured] class received something in the settlement, but those in the [less injured] class did not." 356 F.3d at 783; *see also, e.g. Crawford v. Equifax Payment Svcs., Inc.*, 201 F.3d 877, 880, 882 (7th Cir. 2000) (settlement reversed because class members "gain nothing . . . but lose something: the possibility of any collective proceeding for damages.").

In purporting to benefit the class as a whole, the courts below offered the skewed notion that the entire class would benefit by helping *only* those deemed the "neediest" members of the class, imputing to *all* class members the common intent to donate their stake in the settlement to that particular goal. That is a bold supposition and an odd notion of "benefit," to say the least. Suffice it to say that such a view of "benefiting" the entire class is not even remotely the law. *See Mirfashi*, 356 F.3d at 783-84 (finding "preposterous" the argument "that the members of the pure information sharing class didn't really receive nothing in exchange for giving up their claims; they received the emotional satisfaction of knowing that Fleet had been forced to give up its profits."; "*There is no indirect benefit to the class from the defendant's giving the money to someone else.*") (emphasis added).[14]

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[14] The current disparity in the Looted Assets allocation also runs afoul of the rule articulated by Judge Friendly in *National Super Spuds, Inc., v. New York Mercantile Exchange*, 660 F.2d 9 (2d Cir. 1981), that a class settlement may not compromise one group of class members' rights without consideration, even though it confers benefits on other settling class members. It held: "An advantage to the class, no matter how great, simply cannot be bought by the uncompensated sacrifice of claims of members, whether few or many, ..." *Id.* at 19.

This logic is no more valid than that employed by the Fifth Circuit in *Ortiz,* which drew the condemnation of Judge Smith, in dissent, who characterized the majority's reasoning as holding that "the settlement transformed the claims into something other than *in personam* claims." *In re Asbestosis Litig.*, 90 F.3d 963, 1016 & n. 56 (5th Cir. 1996). This Court agreed with Judge Smith in reversing *Ortiz.*

C. A Distribution Consistent With Class Members' Current Residence Would Satisfy the Rule that Class Settlement Allocations Must Benefit the Class as a Whole.

A proportional geographical distribution is the only one that would satisfy the underlying purposes of the litigation, *i.e.*, to provide a tangible benefit for the class as a whole from the Swiss defendants who profited from the Nazi thefts. It is the closest method possible of achieving a *per capita* payment with these settlement funds.

All members of the Looted Assets Class, who suffered equal injury from Swiss thefts, began the litigation with the same rights to recover and benefit from settlement funds, regardless of where they live today. When the funds are inadequate to provide a meaningful *per capita* cash distribution to *all* class members, the question under the *cy pres* doctrine, must be how to distribute the funds so as to benefit the class *as a whole.*

The only method of distribution that benefits the class *as a whole*, consistent with other federal precedents, is one that seeks to provide *equal opportunity to share in the settlement proceeds*, rather than one that, like the circuit court's approved formula, predictably dooms similarly situated class members because of categorical judgments based on criteria that are irrelevant to the common legal injury suffered by the class as a whole.

Unlike the admittedly unprecedented distribution upheld by the court of appeals, the population-based methodology

urged by U.S. Survivors has precedent in other class settlements. *See West Virginia v. Chas. Pfizer & Co.*, 440 F.2d 1079 (2d Cir. 1970) (*cy pres* distribution to states and individual plaintiffs based on relative population percentages and to governmental plaintiffs *pro rata* on the basis of hospital beds), *cert denied*, 404 U.S. 871 (1971); *Rosner v. United States of America*, Case No. 01-1849-CIV-SEITZ, S.D. Fla., Final Order and Judgment, Sept. 30, 2005 (*cy pres* distribution of $25.5 million class settlement of Hungarian Nazi victims' and heirs' claims for misappropriation of property obtained by the U.S. Government after WWII from the "Hungarian Gold Train," distributed for social services according to current world population of Hungarian Survivors– 42.5% in Israel, 22.7% in Hungary, 20.1% in the U.S., 6.1% in Canada, etc.); *In re Toys "R" Us Antitrust Litig.*, 191 F.R.D. 347 (E.D.N.Y. 2000) (*cy pres* distribution of toys and educational programs among the governmental plaintiffs on basis of population).

Contrary to such population-based distributions, the allocation formula below leaves thousands of class members in the U.S., who are indisputably in financial need and lacking in adequate human and social services, without any chance of receiving *any benefit* from the settlement. [15]

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[15] According to data in the record, most Holocaust Survivors in the U.S. today are between 75 and 85 years of age. They are dying at a rate of 5-10% per year. There are between 30,000 and 45,000 U.S. Survivors who live at or below the poverty level, and approximately 20,000 who cannot provide for basic needs such as food, medicine, dental care, eyeglasses, hearing aids, home care, emergency rental and utilities assistance, transportation for vital services, and health care services, and do not receive adequate support from "social safety nets." JA 7385-7424, 7436-7713. Record estimates of the cost to address these needs among U.S. Holocaust survivors ranged from a minimum of $30 million per year to over $70 million per year. JA 7608-7615, 7457-7588. Against these needs, the United States will receive approximately $750,000 of the $21 million distributed each year.

In sum, until the Second Circuit's decision, federal circuits had universally held that no goal, not even the increase in the total settlement fund, can justify a settlement that eliminates the rights of some class members in order to confer a benefit on other members who suffered the same injury. This rule applies whether the settlement is distributed in cash, in coupons, or, here, under the *cy pres* doctrine. The current allocation scheme violates Rule 23 and the due process rights of U.S. Survivors in the Looted Assets Class.

III. THE PROCEDURES LEADING TO THE DISCRIMINATORY ALLOCATIONS VIOLATED RULE 23 AND THE CONSTITUTION.

A. The U.S. Survivors Were Denied the Right to Opt Out After Learning That They Would Receive No Benefits from the Settlement.

The court of appeals decision also violates Rule 23 and the constitutional guarantee of due process and the right to a jury trial because the U.S. Survivors' rights were extinguished in a process in which the class members were not informed prior to the opt-out deadline that their claims would be compromised for no consideration. Rule 23(b)(3) clearly requires that class members be provided with an opportunity to opt out of a settlement of a Rule 23(b)(3) class action, *i.e.*, one for money damages, and the court below violated this requirement. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812-13 (1985).

This Court and all other circuits in recent decisions have increasingly circumscribed various devices which have attempted to provide defendants with "comprehensive legal peace" by preventing class members from being able to opt out of settlements involving monetary claims.[16] In *Ortiz*, this

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[16] In *Amchem Prods. v. Windsor*, 521 U.S. 591, 628 (1997), this Court held that the class notice must provide class members with information "needed to decide, intelligently, whether to stay in or opt out." *See also*

Court reversed a mandatory class under Rule 23(b)(1)(B) which was designed to settle monetary claims of future asbestos claimants, holding that the process violated Rule 23 and plaintiffs' Fifth Amendment due process and their Seventh Amendment jury trial rights by not affording the right to opt out.

This is the consensus in all other courts of appeals except for the Second Circuit. *See In re Telectronica Pacing Sys., Inc.*, 221 F.3d 870, 881 (6th Cir. 2000) (Supreme Court has stressed in interpreting Rule 23 that "principles of sound judicial management and constitutional considerations of due process and the right to jury trial all lead to the conclusion that in an action for money damages class members are entitled to personal notice and an opportunity to opt out."); *Jefferson v. Ingersoll Int'l*, 195 F.3d 894 (7th Cir. 1999) (same); *Brown v. Ticor Title Ins. Co.* 982 F.2d 386 (9th Cir. 1992) (following *Shutts*, *res judicata* not applicable to previous hybrid suit that involved the foreclosure of substantial damage claims because plaintiffs did not have the right to opt out.); *Continental Can Co.*, 706 F.2d at 1155 (reversing due to absence of right to opt out of settlement); *see also* Advisory Committee Notes to Rule 23 ("The opt out right provided by Rule 23(b)(3) is an essential safeguard for the constitutional rights of absent class members claming monetary damages.").

In the present case, had there been timely public disclosure of the allocation plan which the Special Master later formulated, it was predictable that very large numbers of Looted Assets Class members would have opted out of the class, with two likely effects. The Swiss banks would have had to consider whether they wanted to settle a class action

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Twigg v. Sears, Roebuck & Co., 153 F.3d 1222, 1227-28 (11th Cir. 1998) ("the notice must also contain information reasonably necessary to make a decision to remain a class member and be bound by the final judgment or opt out of the action") (*quoting In re Nissan Motor Corp. Antitrust Litig.*, 552 F.2d 1088, 1103-05 (5th Cir. 1977)).

with a significant number of individuals outside the class, and the Special Master would have been motivated to weight more evenly the needs of *all* survivors in that class. That such information was withheld from the class until after it was too late to opt out essentially vitiated their opt-out rights entirely.

The district court and the court of appeals approved this "bifurcated" procedure under the authority of *In re Agent Orange Product Liab. Litig.*, 818 F.2d 145, 170 (2d Cir. 1987). While it is true that the Second Circuit in *Agent Orange* approved a bifurcated process by which the "fairness" of a settlement amount was approved prior to an allocation plan, there is nothing in Rule 23 that permits such an approach. Where essential matters such as allocation are yet to be resolved, a "bifurcated process" is tantamount to denying the right to opt out and is forbidden.

The bifurcated procedure approved below, on the authority of *Agent Orange*, is no different analytically than the settlement certified in *Ortiz* under Rule 23(b)(2) as a means to avoid the opt-out requirement of Rule 23(b)(3). In *Ortiz*, "Respondent admitted at the fairness hearing that 'the prospect of having to pay tort judgments to opt-outs not covered by the settlement would have spoiled the Insurers' hope of 'total peace' so the Insurers were adamant that any global agreement here would have to be done on a non-opt out basis.'" Petition for Writ of Certiorari, *Ortiz v. Fireboard Corp.*, 1998 WL 34081053, at 30. This is precisely what happened below to the Looted Assets class, and this Court should curb its abuse for this and future cases.

B. The Representational Structure Adopted Below Denied Petitioners Adequate Legal Representation as Required by Rule 23 and Due Process

Looted Assets Class members were denied adequate representation of counsel in a series of implausible and illogical steps that resulted in the illegal allocations outlined above.

This denial began with the district court expressly choosing to ignore *Amchem* and *Ortiz* at the settlement stage, App. B18, which prevented the class from having non-conflicted counsel who would (a) protect their right to be informed about what the settlement would provide before the opt out deadline, or (b) bargain for a fair portion of the $1.25 billion settlement fund at a time when they could have insisted on a sufficient allotment to prevent the "scarcity" argument relied on by the district court to shortchange the vast majority of the class. The inadequate representation continued through the allocations process, in which Lead Counsel failed to advocate for class members to correct the disparate intra-class allocations in the second and third distributions, even if he believed they were wrong.

Rule 23(a)(4) provides "One or more members of a class may sue or be sued as representative parties on behalf of all only if . . . (4) the representative parties will fairly and adequately protect the interests of the class . . . ." The adequacy analysis "factors in competency and conflicts of class counsel." *Amchem*, 521 U.S. at 626 n. 20 (citing *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 157-158 n. 13 (1982)). Lead Counsel's failure to advocate for the Looted Assets Class members as noted above, and his decision to back the district court instead, demonstrate inadequacy of representation under the case law and common sense. In *Amchem*, this Court condemned a "global compromise with no structural assurance of fair and adequate representation for the diverse groups and individuals affected . . . and each named party "served generally as representative of the whole, not for a separate constituency." 521 U.S. at 626; *see Gonzalez v. Cassidy*, 474 F.2d 67, 72 (5th Cir. 1973) (primary criterion for adequacy is "whether the representative, through qualified counsel, vigorously and tenaciously protected the interests of the class."; "failure to appeal prospective-only judgment that denied any relief to injured class members was inadequate representation"); *see also Crawford v. Honig*, 37 F.3d 485,

488 (9th Cir. 1994) (class members were not adequately represented where ban on IQ testing was broadened, without any factual support, to preclude all IQ testing of African American school children diagnosed as learning disabled);

This Court has held that due process requires adequate representation "at all times" throughout the proceedings. *Shutts*, 472 U.S. at 812 ("the Due Process Clause of course requires that the named plaintiff *at all times* adequately represent the interests of the absent class members") (Emphasis supplied), citing *Hansberry v. Lee*, 311 U.S. 32, 42-43, 45 (1940). *See also Stephenson v. Dow Chemical Co.*, 273 F.3d 249, 260-261 (2d Cir. 2001) ("Due process requires adequate representation 'at all times' throughout the litigation," such that future claimants whose injury from Agent Orange was unknown at time of broad 1984 settlements were not precluded by *res judicata* from bringing independent actions in 1998 and 1999 based on Supreme Court's holdings in *Amchem* and *Ortiz* that representative structure violated due process), *aff'd by an equally divided court*, 539 U.S. 111 (2003); *Gonzalez v. Cassidy*, 474 F.2d at 72 (court must view the representative's conduct of the "entire litigation.")

The district court imposed this unprecedented allocation formula through a process in which allocations among the five separate certified settlement classes and within the Looted Assets Class were recommended to the Court by a "neutral Special Master," who consulted with "pro bono" class counsel regarding those allocation recommendations. App. B10.

Lead Counsel provided the rationale for the district court's patently incorrect conclusion. He argued that class members' due process and Rule 23 rights were adequately protected under the political doctrine of "exit, loyalty, and voice," wherein the class agreed to commit to a "fair process" guided by the special master and the "financially disinterested" class counsel who would "represent the interests of the entire class," which thus donned a "veil of ignorance" about

its settlement rights, in reliance on the beneficence of these court functionaries. *E.g.*, JA 7132.

This peculiarity of the representation provided by Lead Counsel, centered on the philosophy of John Rawls instead of the jurisprudence of this Court, was repeated and highlighted in a remarkable colloquy regarding Lead Counsel's loyalties. In response to an inquiry from a Second Circuit clerk, asking who Lead Counsel represented in the appeal, the District Court wrote: "Professor Neuborne does not represent any party in the context of the current appeals. By submitting briefs, Professor Neuborne is simply providing an adversarial defense of my position for the benefit of the Second Circuit. In this sense, his current role is analogous to that of a lawyer who might be appointed to defend a judge's decision after a writ of mandamus." App. H1-2.

Lead Counsel's response was somewhat more nuanced but equally troubling. He wrote: "I . . . take issue with your statement that I do not represent any party in the context of the appeals. . . . [W]hen I accepted your request that I agree to serve as Lead Settlement Counsel, I entered into an intense attorney-client relationship with the class that continues to this day. Thus, when I appear in defense of your rulings, I do not appear solely as a functionary of the Court, but as Lead Settlement Counsel for the plaintiff-classes with a duty to defend your rulings as long as they are supported by law, or rest within your discretion. Letter from Burt Neuborne to the Hon Edward Korman, September 14, 2004.

Lead Counsel simultaneously eschewed any responsibility to advocate for class members injured by court decisions, even if he disagreed with those decisions:

> I have sought to facilitate open communication between any member of the class and the Special Master, as well as the Court. I have advised Class members on the best way to present their concerns to the Court. I have provided the Court with personal views on alloca-

> tion and distribution decisions. *But, most of all, I have committed myself to defending the results of the process, even when I do not wholly agree with the outcomes.*"

Id. (Emphasis supplied).[17]

The court of appeals approved the multiple, conflicting roles played by "Lead Counsel: "Although the Lead Settlement Counsel does not represent any party in the context of these appeals, he has played a number of important roles in this litigation, both as a representative of the plaintiffs and as 'something of a general counsel to the administration of the settlement fund.'" App. A8.

The U.S. Survivors, whose rights were compromised for no benefits through these series of maneuvers, contend that such "representation" is inadequate *per se*. There is no principle that permits "class counsel" to subordinate the interests of the majority of the class in service of a special master and district court's conception of "rough justice." Certainly, such "loyalty" is not contemplated by Rule 23 and the Fifth

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[17] Petitioners add that the Lead Counsel's conflicts and inadequate representation, which they raised during the supplemental allocations proceedings below, are even more apparent now. After the Second Circuit's affirmance of the allocation formula, Lead Counsel removed his "pro bono" hat and asked the district court for $4.1 million for his "post settlement" work – beginning in February 1999 and including the initial allocations phase in which the FSU-based allocation was created, the time he promised to support future allocations to rectify the initial imbalance, and the two supplemental allocations when he fended off the U.S. Survivors' efforts to secure an increased share in the supplemental distributions. Petitioners believed Lead Counsel was conflicted at the time, with his "pro bono" status irrelevant. Now, Lead Counsel's fee request reveals that *all this time* he was harboring expectation of payment from the District Court (contrary to his prior declarations), and provides a lucid explanation for why he determined to "*defend the district court's exercise of discretion*" *rather than advocate for disfavored Looted Assets class members. See In re General Motors Corp. Pick Up Truck Fuel Tank Products Liab. Litig.*, 55 F.3d at 803-805 (class counsel's simultaneous negotiation of fees and settlement terms created a conflict which violated class members' rights under Rule 23 and due process to adequate representation).

Amendment. Stated differently, the U.S. Survivors as Looted Assets Class members have the right to be protected by the well-established, easy to apply protections of Rule 23 and the Constitution, and not to be stymied in their pursuit of justice by Lead Counsel's invocation of political philosophers to justify the abandonment of these rules.

CONCLUSION

This is a historic lawsuit, which sought monetary restitution and accompanying moral acknowledgement of some of the thefts that occurred during the Nazi Holocaust. This case and its settlement invoked the power of the United States court system and the majesty of its laws including international law to bring a "measure of justice" to the victims of that epic wrongdoing. It will be will be the authoritative statement as to how the legal system may serve to vindicate those rights which, though incapable delivering an adequate remedy for mass murder, do allow victims to obtain material restitution from those who profited from such crimes. The distributions below, however motivated by charitable considerations, nonetheless departed from well-established rules of class action and constitutional law that require like treatment for like injuries. This Petition for Certiorari presents the last chance for the U.S. Courts to fashion a remedy for the Looted Assets Class that satisfies Rule 23 and due process principles, reinforces the moral underpinnings of the litigation, and prevents standardless class action settlements that leave large blocks of plaintiffs with nothing other than a sense that the American courts failed them.

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: April 3, 2006

APPENDICES

APPENDIX A

424 F.3d 132

United States Court of Appeals,Second Circuit.
In re HOLOCAUST VICTIM ASSETS LITIGATION.

Samuel J. Dubbin, Plaintiff-Appellant,

Pink Triangle Coalition, Karl Lange and Pierre Seel, Interested Parties-Cross-Appellants,

v.

Union Bank of Switzerland, Swiss Bank Corp., also known as Swiss National Bank, Banking Institutions # 1-100, John Does # 1-100, Certain Swiss Bank Accounts described as follows, Swiss Bankers Assoc., Swiss Bankers Association, and Bank of International Settlements, Defendants-Appellees, Plaintiffs' Executive Committee Settlement Class, Interested-Party-Appellee,

Judah Gribetz, Special Master,

Jacob Friedman, Estelle Sapir and Miriam Stern, on behalf of themselves and all other persons similarly situated, Plaintiffs, World Jewish Restitution Organization, South Florida Holocaust Coalition and Thomas Weiss, Intervenor-Plaintiffs, Washington State Insurance Commissioner, Gregory Tsvilichovsky, Matvey Yentus, Sofiya Bloshteyn, Olga Tsvilikhovskya, Larisa Ryabaya, Rosa Yentus, Pavel Aronov, Lubov Starodinskaya, and Eliazar Bloshteyn, Interested-Parties, Polish American Defense Committee, Inc., a non-profit California Corporation, Irving Wolf, Disability Rights Advocates and Director of International Affairs and Representative to the United Nations of Agudath Israel World Organization, Movants,

G.K., a Holocaust Survivor and member of the New American Jewish Club of Miami, L.K., a Holocaust Survivor and member of the New American Jewish Club of Miami, F.K., a Holocaust Survivor and member of the New American Jewish Club of Miami, Holocaust Survivors Foundation USA, Inc. (HSF), David Schaecter, individually and as President of the Holocaust Survivors Foundation-USA, Inc., Leo Rechter, individually and as President of the National Association of Jewish Holocaust Survivors (NAHOS), National Association of Jewish Holocaust Survivors (NAHOS), David Mermelstein, individually and as President of the New American Jewish Club of Miami and President of the South Florida Holocaust Survivors Coalition, New American Jewish Club of Miami, South Florida Holocaust Survivors Coalition, Alex Moskovic, individually and as President of the Child Survivors/Hidden Children of the Holocaust, Inc., Child Survivors/Hidden Children of the Holocaust, Inc., Esther Widman, individually as member of the National Association of Jewish Holocaust Survivors (NAHOS), Fred Taucher, individually and as President of the Survivors of the Holocaust Recovery Project (SHARP), Survivors of the Holocaust Recovery Project (SHARP), Nesse Godin, individually and as President of the Jewish Holocaust Survivors and Friends of Greater Washington, Jewish Holocaust Survivors and Friends of Greater Washington, Henry Schuster, individually and as President of the Holocaust Survivors Group of Southern Nevada, Holocaust Survivors Group of Southern Nevada. Herbert Karliner, individually and as a member of the Holocaust Survivors Foundation-USA, Inc. and the South Florida Holocaust Survivors Coalition, Lea Weems, individually and as President of the Houston Council of Jewish Holocaust Survivors, Houston Council of Jewish Holocaust Survivors, Sam Gasson, individually and as President of the Habonim Cultural Club, Survivors of the Holocaust, Habonim Cultural Club, Survivors of the Holocaust, Holocaust Survivors of South Florida, Dena Axelrod, individually and as a member of the Child Survivors of the Holocaust, South Florida Group and the South Florida

Holocaust Survivors Coalition, Saul Birnbaum, individually and as President of the Holocaust Survivors Club of Boca Raton (Century Village), Holocaust Survivors Club of Boca Raton (Century Village), Miriam Rubin, Individual Holocaust Survivor, Doris Fedrid, Individual Holocaust Survivor, Helga Gross, Individual Holocaust Survivor, National Federation of the Blind, USA, German Council of Centers for Self-Determined Lives, Finist, Russia, Equal Ability Limited, United Kingdom, Through the Looking Glass, USA, Disabled Persons International, Canada, World Institute on Disability, USA, Center for Independent Living, Bulgaria, Disability Rights Education and Defense Fund, USA, Center for Independent Living, Berkeley, USA, California Foundation for Independent Living Center, Independent Living Resource Center, San Francisco, Computer Technologies Program, USA, Ragged Edge/Avocado Press, USA, Legal Advocacy for the Defense of People with Disabilities, National Confederation of Disabled Persons, Greece and De juRe Alapitvany, Hungary, Appellants.

Docket Nos. 04-1898(L), 04-1899(CON).

Argued: May 16, 2005.
Decided: Sept. 9, 2005.

Before: **MESKILL**, **NEWMAN**, and **CABRANES**, Circuit Judges.

JOSÉ A. CABRANES, Circuit Judge.

The Holocaust Survivors Foundation-U.S.A., Inc. ("HSF"), and several individuals and organizations, appeal from the March 9, 2004 memorandum and order of the United States District Court for the Eastern District of New York (Edward R. Korman, *Chief Judge*).[1] The District Court re-

[1] This appeal was consolidated with an appeal from the District Court's denial of attorney's fees brought by Samuel J. Dubbin, HSF's counsel.

jected the HSF's objections to the Court's earlier orders, which had allocated supplemental funds to one of the settlement classes in the litigation styled as the Holocaust Victim Assets Litigation. On appeal, the HSF continues to object to the manner in which the District Court allocated funds among class members. In particular, the HSF asserts that needy Holocaust survivors residing in the United States have received a disproportionately small allocation, relative to the needy survivors residing in the former Soviet Union ("FSU").

Because the District Court acted well within the bounds of its discretion in allocating the settlement fund, we affirm.

BACKGROUND

I. Swiss Bank Settlement

The Holocaust Victim Assets Litigation began in 1996 and 1997, when several class actions against leading Swiss banks were filed in the District Court and subsequently consolidated. *See In re Holocaust Victim Assets Litig.*, 105 F.Supp.2d 139, 141 (E.D.N.Y.2000). The District Court has described the principal claims of these class actions as follows:

Plaintiffs alleged that, before and during World War II, they were subjected to persecution by the Nazi regime, including genocide, wholesale and systematic looting of personal and business property and slave labor. Plaintiffs alleged that, in knowingly retaining and concealing the assets of Holocaust victims, accepting and laundering illegally obtained Nazi loot and transacting in the profits of slave labor, Swiss institutions and entities, including the named defendants, collaborated with and aided the Nazi regime in furtherance of war crimes, crimes against humanity, crimes against peace, slave labor and genocide. Plaintiffs also alleged that defendants breached fiduciary and other duties; breached contracts; converted plaintiffs' property; enriched themselves

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We adjudicate Dubbin's appeal in a separate opinion. *See In re Holocaust Victim Assets Litig.*, 424 F.3d 150 (2d Cir.2005).

unjustly; were negligent; violated customary international law, Swiss banking law and the Swiss commercial code of obligations; engaged in fraud and conspiracy; and concealed relevant facts from the named plaintiffs and the plaintiff class members in an effort to frustrate plaintiffs' ability to pursue their claims. Plaintiffs sought an accounting, disgorgement, compensatory and punitive damages, and declaratory and other appropriate relief.

Id. at 141-42. In May 1997, defendant banks moved to dismiss the litigation or, in ***136** the alternative, to stay the proceedings. *Id.* at 142.

While defendants' motions were pending, the parties engaged in settlement discussions facilitated by Stuart E. Eizenstat, then Under Secretary of State and Special Representative of the President and Secretary of State on Holocaust Issues. *Id.* In August 1998, after the District Court became involved in the discussions, the parties agreed in principle to settle the litigation for $1.25 billion to be distributed for the benefit of "Jews, homosexuals, Jehovah's Witnesses, the disabled and Romani-groups recognized by the United Nations as having been the targets of systematic Nazi persecution." *Id.* at 142-43. On January 26, 1999, the parties formally executed the Class Action Settlement Agreement ("Settlement Agreement"), subject to the District Court's approval.

On March 30, 1999, the District Court provisionally approved the Settlement Agreement and certified, pursuant to Federal Rule of Civil Procedure 23(a) and (b)(3),[2] five settle-

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[2] Fed.R.Civ.P. 23 provides, in relevant part:

> (a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if
>
> (1) the class is so numerous that joinder of all members is impracticable,
>
> (2) there are questions of law or fact common to the class,

ment classes: Deposited Assets Class, Looted Assets Class, Slave Labor Class I, Slave Labor Class II, and Refugee Class. *Id.* at 143-44. Membership in all except the Slave Labor Class II is limited to members of groups targeted for Nazi persecution.[3]

Two of the classes are particularly relevant to this appeal. The Deposited Assets Class, as its name suggests, consists of Nazi persecution victims and their heirs whose claims are

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(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and

(4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

* * *

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include:

(A) the interest of members of the class in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum;

(D) the difficulties likely to be encountered in the management of a class action.

[3] Membership in those four classes was limited to "Victim[s] or Target[s] of Nazi Persecution," a phrase that encompassed individuals or entities "persecuted or targeted for persecution by the Nazi Regime because they were or were believed to be Jewish, Romani, Jehovah's Witness, homosexual, or physically or mentally disabled or handicapped." Settlement Agreement § 1.

grounded in assets that were *deposited* by the victims with Swiss banks.[4] *See id.* at 143. The Looted Assets***137** Class, by contrast, includes principally "those who claim their property was *looted* by Nazis and then *disposed* of through the Swiss Banks."[5] *In re Holocaust Victim Assets Litig.*, 413 F.3d 183, 185 (2d Cir.2001) (emphasis added).

The Settlement Agreement provided for the appointment of a Special Master to "develop a proposed plan of allocation and distribution of the Settlement Fund, employing open and equitable procedures to ensure fair consideration of all proposals for allocation and distribution." Settlement Agreement § 7.1. As Lead Settlement Counsel, Professor Burt

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[4] Specifically, the Deposited Assets Class includes "Victims or Targets of Nazi Persecution and their heirs, successors, administrators, executors, affiliates and assigns who have or at any time have asserted, assert or may in the future seek to assert Claims against any Releasee for relief of any kind whatsoever relating to or arising in any way from Deposited Assets or any effort to recover Deposited Assets." Settlement Agreement § 8.2(a). It should be noted that the term "Releasees" under the Settlement Agreement is not limited to Swiss bank defendants, and that the Settlement Agreement resolved legal claims against, *inter alia*, the Swiss government, the Swiss National Bank (that is, Switzerland's central bank), and certain Swiss businesses. *Id.* at § 1.

[5] The Settlement Agreement defined members of the Looted Assets Class as "Victims or Targets of Nazi Persecution and their heirs, successors, administrators, executors, affiliates and assigns who have or at any time have asserted, assert or may in the future seek to assert Claims against any Releasee for relief of any kind whatsoever relating to or arising in any way from Looted Assets or Cloaked Assets or any effort to recover Looted Assets or Cloaked Assets." Settlement Agreement § 8.2(b). The term "Looted Assets" refers to assets "actually or allegedly belonging in whole or in part to Victims or Targets of Nazi Persecution that were actually or allegedly stolen, expropriated, Aryanized, confiscated, or that were otherwise wrongfully taken by, at the request of, or under the auspices of, the Nazi Regime." *Id.* at § 1. The term "Cloaked Assets," by contrast, refers to assets belonging to, *inter alia*, entities and individuals "associated with the Nazi Regime . .., the identity, value or ownership of which was in fact or allegedly disguised by ... any Releasee." *Id.*

Neuborne of the New York University Law School,[6] explained:

> [t]he decision to utilize a Special Master to propose a plan of allocation and distribution was motivated by a desire to spare Holocaust survivors from being forced into an adversarial relationship that would have required them to squabble over a settlement fund that, while substantial, is necessarily insufficient to do full justice to all members of each plaintiff class. It was hoped that a neutral Special Master, acting with the guidance of the affected community, could conduct a serious inquiry into the facts and law, and propose a plan of allocation and distribution that would do non-adversarial justice to the claims of all class members.

In re Holocaust Victim Assets Litig., Submission of Lead Settlement Counsel in Support of the Special Master's Proposed Plan of Allocation and Distribution of Settlement Proceeds, No. CV 96-4849, at 3 (E.D.N.Y. Nov. 20, 2000). On March 31, 1999, the District Court appointed The Honorable Judah Gribetz as Special Master for this litigation.[7]

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[6] Although the Lead Settlement Counsel does not represent any party in the context of these appeals, he has played a number of important roles in this litigation, both as a representative of the plaintiffs and as "something of a general counsel to the administration of the settlement fund." *In re Holocaust Victim Assets Litig.*, No. CV 96-4849, slip op. at 3 (E.D.N.Y. Sept. 13, 2004). The District Court has authorized the Lead Settlement Counsel to provide "an adversarial defense" of the District Court's position in this Court. *Id.*, slip op. at 1.

[7] As the District Court later underscored, Mr. Gribetz

> is an extraordinarily able lawyer with a long record of distinguished public service. He has served as Counsel to the Governor of the State of New York and as Deputy Mayor of the City of New York. He has contributed his time and energy to charitable and community organizations too numerous to recite. Most importantly, he has a deep understanding of all issues related to the Holocaust. He is a member of the Board of the Museum of

***138** Under the District Court's direction, an extensive plan was implemented to give notice of the Settlement Agreement to members of the settlement classes. 105 F.Supp.2d at 144-45. This notice plan included "(i) world-wide publication, (ii) press coverage, (iii) an extensive community outreach program, (iv) a direct mail program that included the sending of more than 1.4 million notice packages directly to potential class members in at least 48 countries and (v) an Internet notice effort." *Id.* The District Court then conducted two fairness hearings-one in its Brooklyn courtroom on November 29, 1999 and another by telephone connection with Jerusalem on December 14, 1999. *Id.* at 145.

On August 9, 2000, the District Court's final order and judgment approving the Settlement Agreement was entered.[8] In discussing the procedural fairness of the settlement, the District Court observed:

> [B]ased upon my extensive personal involvement in the process, I know that the compromise was reached as the result of lengthy, well-informed and arm's-length negotiations by competent and dedicated counsel who provided loyal and effective legal representation to all parties. Counsel for the plaintiff settlement classes are experienced plaintiffs' advocates and class action lawyers. One could not assemble a more capable group. Among the lawyers for the plaintiffs who are serving without fee are Professor Burt Neuborne of New York University Law School, a brilliant scholar and advocate, who de-

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Jewish Heritage-A Living Memorial to the Holocaust, which is located in New York. He is also the author of The Timetables of Jewish History (1993).

In re Holocaust Victim Assets Litig., 2000 WL 33241660, at *1, 2000 U.S. Dist. LEXIS 20817, at *5-*6 (E.D.N.Y. Nov.22, 2000).

[8] The Settlement Agreement was approved by the District Court as amended by the parties, most recently on on August 9, 2000. Subsequent references to the Settlement Agreement are to the amended version granted final approval by the District Court.

> veloped the class's legal theories and who presented legal argument on behalf of plaintiffs, and Melvyn H. Weiss and Michael D. Hausfeld, leading members of the class action bar, who ably led plaintiffs' negotiating team. While I have independently evaluated the fairness of the settlement, the unanimous support of this group in favor of final approval is entitled to great weight.

Id. at 146. The Court declined, however, to embrace at that point any specific method of allocating and distributing the $1.25 billion fund, explaining the sequence of its decisions as follows:

> [O]rdinarily, it is preferable to provide specific information to class members concerning their likely recovery prior to the fairness hearing in order to permit criticism and challenge, if appropriate. However, the special circumstances of this litigation, involving five worldwide settlement classes arising out of events that transpired approximately 60 years ago, make it virtually impossible to provide specific information to individuals about their precise recovery prior to the completion of the elaborate claims processes contemplated by the Settlement ....
>
> .... [O]nce I have approved the basic fairness of the settlement and its attendant procedures, the Special Master will promptly issue his recommendations concerning allocation and distribution and those recommendations will be transmitted for comment and criticism to the members of the plaintiff classes. Only after I approve the plan of allocation***139** and distribution will a claims process capable of generating specific figures be possible.

Id. at 150-51.

On September 11, 2000, the Special Master submitted to the District Court a proposal for the allocation and distribution of settlement proceeds. *See In re Holocaust Victim As-*

sets Litig., No. CV 96-4849 (E.D.N.Y. Sept. 11, 2000) (Special Master's Proposed Plan of Allocation and Distribution of Settlement Proceeds) ("Special Master's Proposal"), *at* J.A. 714. The Special Master reported that, in the course of developing his proposal, he had consulted with dozens of individuals, "reviewed many formal proposals submitted from around the world," and received thousands of letters, primarily from Holocaust survivors. *Id.* at 2; *at* J.A. 720. The suggestions received by the Special Master shared several "common themes":

> that the task before the Special Master and, ultimately, the [District] Court, is daunting; that the settlement of the litigation against the Swiss banks represents, in some small fashion, another historic opportunity in the attempt to redress the indescribable wrongs that have been wrought against the victims of the Holocaust; and that the allocation and distribution of the $1.25 billion settlement fund should be meaningful, with some lasting impact upon class members.

Id. (footnote omitted). Many of those who communicated with the Special Master, especially Holocaust survivors, viewed the Swiss Bank settlement as "a further step along the often tortuous path toward accountability and remembrance." *Id.* Furthermore, the Special Master undertook his task-the "daunting" task of allocating and distributing "an historic, yet limited, settlement fund in a manner which is fair, equitable and consistent with governing legal principles"-with the recognition thatno amount of money could begin to compensate the millions of victims of Nazi persecution for the horrors they suffered during the Holocaust, that no amount of money could restore the generations that were lost, and that no amount of money could right the injustice perpetrated by Nazi Germany that has been termed "one of the greatest thefts by a government in history." *Id.* at 2-3 (quoting Stuart E. Eizenstat, *Foreword* to Stuart E. Eizenstat & William Z. Slany, U.S. Dep't of State, *U.S. and Allied Efforts to Recover and*

Restore Gold and Other Assets Stolen or Hidden by Germany During World War II-Preliminary Study at iii, iii (1997), *available at* http://www.state.gov/www/regions/eur/ngrpt.pdf), *at* J.A. 720-21.

In allocating the $1.25 billion settlement fund among the five settlement classes, the Special Master concluded that the Settlement Agreement accorded "priority" to distributions directed to members of the Deposited Assets Class. *Id.* at 10-12, *at* J.A. 728-30. The Special Master underscored that

> [m]ore than three years after the complaints were filed in this lawsuit, the unprecedented forensic accounting investigation conducted by the Independent Committee of Eminent Persons ("ICEP," also known as the "Volcker Committee" after its Chairman, [the former Chairman of the Federal Reserve Board] Paul A. Volcker), concluded that some 54,000 Swiss bank accounts are "probably" or "possibly" related to Holocaust victims, and, accordingly, that these accounts can be returned to their proper owners, virtually all of whom by now are the original owners' heirs.

Id. at 11 (footnote omitted), *at* J.A. 729. Even before the Special Master submitted ***140** his proposal, the District Court noted that "the report of the Volcker Committee, which included three members appointed by the Swiss Bankers Association, ... provided legal and moral legitimacy to the claims asserted ... on behalf of the members of the Deposited Assets Class." *In re Holocaust Victim Assets Litig.*, 105 F.Supp.2d at 153. Relying on the report of the Volcker Committee and on consultations with that Committee's members, the Special Master estimated that "the value of all bank accounts that will be repaid is within the range of $800 million," and allocated that amount to the Deposited Assets Class. Special Master's Proposal at 15; *at* J.A. 733.

The remainder of the $1.25 billion fund became available for, *inter alia*, allocation to the other four settlement classes,

including the Looted Assets Class. *Id.* In addition, the Special Master noted that some of the initial $800 million allocation to the Deposited Assets Class may remain unclaimed after the conclusion of the claims process, and may therefore be reallocated to other settlement classes. *Id.*

The Special Master then explained that allocation and distribution of funds to the Looted Assets Class posed unusual challenges:

> There is scarcely a victim of the Nazis who was not looted, and on nearly an incomprehensible scale....
>
> * * *
>
> With only limited exceptions, however, the current historical record simply does not permit precise determinations even as to the material losses in total, much less the nature and value of the loot traceable to Switzerland or Swiss entities....
>
> It is neither justifiable nor appropriate to select which looting victims may be entitled to recompense from this $1.25 billion Settlement Fund based entirely upon the happenstance of where the Nazi Regime chose to direct which loot, which records of the plunder happen to survive, and which items one may hazard a guess may have found their way to or through Switzerland. Every surviving "Victim or Target" was looted-many hundreds of thousands of people *excluding heirs.*

Special Master's Proposal at 111-14 (emphasis in original), *at* J.A. 829-32. In light of these considerations, the Special Master rejected a distribution process consisting of individualized valuations of Looted Assets Class members' claims, concluding that such a case-by-case approach would create "an unwieldy and enormously expensive apparatus" and would generate administrative expenses that "would [have] unjustifiably deplete[d] the Settlement Fund." *Id.* at 114-15, *at* J.A. 832-33. The Special Master also recommended against distributing settlement proceeds to all Looted Assets

Class members on a *pro rata* basis, since each class member would then receive "little more than a few dollars"-a result the Special Master considered "obviously untenable."[9] *Id.* at 115, *at* J.A. 833.

***141** Instead, the Special Master recommended that (at least during the first stage of payments from the settlement fund) distributions target the surviving victims of Nazi persecution rather than the victims' heirs. *Id.* at 17-19, *at* J.A. 735-57. Even more significant for this appeal is the Special Master's recognition that the settlement fund, while insufficient to "repay even a small fraction of what was looted in the Holocaust," presented "an opportunity to provide meaningful assistance to the Looted Asset Class members who are in the greatest financial need." *Id.* at 116, *at* J.A. 834. He therefore proposed "an initial allocation of $100 million to *cy pres* programs[10] designed to benefit the neediest elderly survivors of

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[9] As the Special Master explained,

> The estimate of Jewish survivors of Nazi persecution alone ranges from 832,000 to 960,000, a number increased by the varied estimates of Roma, Jehovah's Witness, disabled and homosexual survivors. Moreover, each of the five classes includes, among others, "heirs," a term undefined in the Settlement Agreement but governed by New York law. New York law does not limit "heirs" to children, spouses or even near relatives. Rather, the definition of "heirs" extends well beyond even great-grandchildren of grandparents-and, moreover, must be determined at the time of the decedent's death. Under this definition, the Special Master believes that heirs of Nazi victims, all apparently class members, easily number in the millions.

Special Master's Proposal at 9 (internal citation and footnotes omitted), *at* J.A. 727.

[10]

> The *cy pres* doctrine takes its name from the Norman French expression, *cy pres comme possible*, which means "as near as possible." The doctrine originated to save testamentary charitable gifts that would otherwise fail. Under *cy pres*, if the testator had a general charitable intent, the court will look for an alternate re-

the Holocaust-who perhaps would be less in need today had their assets not been looted and their lives nearly destroyed."[11] *Id.* at 117 (footnote added), *at* J.A. 835. Needy Jewish survivors would receive 90% of the $100 million fund, and the remaining 10% would be distributed to needy Roma, Jehovah's Witness, disabled, and homosexual survivors.[12] *Id.* at 188, *at* J.A. 836.

Of particular significance to the instant appeal is the Special Master's proposed geographic allocation of funds earmarked for needy Jewish Holocaust survivors. This allocation was guided not by the geographic distribution of the Jewish survivors *generally*, but by the geographic distribution of that group's *neediest* members. In this regard, the Special Master observed:

The Jewish survivor community is concentrated primarily in Israel, the former Soviet Union, North America and

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cipient that will best serve the gift's original purpose. In the class action context, it may be appropriate for a court to use *cy pres* principles to distribute unclaimed funds.. In such a case, the unclaimed funds should be distributed for a purpose as near as possible to the legitimate objectives underlying the lawsuit, the interests of class members, and the interests of those similarly situated.

In re Airline Ticket Comm'n Antitrust Litig., 307 F.3d 679, 682-83 (8th Cir.2002) (internal citations omitted). We have previously approved a district court's allocation, pursuant to the *cy pres* doctrine, of settlement funds to those class members " 'most in need of help.' " *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 145, 158 (2d Cir.1987).

[11] An additional $10 million allocation would "benefit ... all members of all five classes" by creating "a comprehensive list, available to all, of all the 'Victims or Targets of Nazi Persecution', and all of their murdered ancestors." Special Master's Proposal at 115-16, *at* J.A. 833-34.

[12] As the Special Master explained, this 90/10 ratio was "based upon precedent" from previous allocations of recovered assets "dating back to 1945" and was "warranted by current demographics ... of surviving 'Victims or Targets of Nazi Persecution' as defined under the Settlement Agreement." Special Master's Proposal at 118-19, *at* J.A. 836-37.

Europe, with additional concentrations in other regions including Australia, Argentina and elsewhere. Their post-War experiences have been extraordinarily diverse. In most Western nations, Nazi victims generally have benefitted from relatively strong economies and "social safety net" programs intended to assist the needy and the ill. Equally significant, Nazi victims in the United States and Israel, as in most Western nations, have been eligible for a wide range of indemnification and restitution programs ***142** intended to provide modest to sometimes significant recompense for the material losses suffered at the hands of the Nazis and their accomplices. However, notably absent from most post-Holocaust compensation programs are the victims of Nazi persecution who remain behind what was once the Iron Curtain.

Id. at 119 (footnotes omitted). The Special Master then "earmarked" 75% (or $67.5 million) of the funds allocated to needy Jewish Holocaust survivors "for programs assisting destitute, elderly Jewish victims of Nazi persecution in the former Soviet Union," *id.* at 120, and approximately 4% "to needy survivors in the United States," *In re Holocaust Victim Assets Litig.*, 302 F.Supp.2d 89, 97 (E.D.N.Y.2004).

The District Court again implemented a notice plan and received "approximately 754 communications" in response to the Special Master's Proposal. *See In re Holocaust Victim Assets Litig.*, 2000 WL 33241660, at *2, 2000 U.S. Dist. LEXIS 20817, at *7 (E.D.N.Y. Nov. 22, 2000). Nonetheless, "the overwhelming majority of the Settlement Class members-more than 99 percent-did not submit any comment regarding the Proposed Plan and presumably had no objection." *Id.* 2000 WL 33241660 at *2, 2000 U.S. Dist. LEXIS 20817 at *7-*8. In an order of November 22, 2000, the District Court, "[a]fter carefully considering all of the comments and objections," found the Special Master's Proposal "carefully reasoned and well supported," and adopted the proposal in its entirety. *Id.*, 2000 WL 33241660 at *3, 2000 U.S. Dist. LEXIS 20817 at *9-*10.

Several individuals who are not appellants here pursued an appeal from the District Court's November 22, 2000 order, challenging, *inter alia*, "(1) the inadequacy of the total settlement amount of $1.25 billion; (2) the allocation of $800 million to the 'Deposited Assets' class, including adjustments for interest, fees, and inflation; (3) the application of the doctrine of *cy pres* to resolve the claims of the 'Looted Assets' class, rather than require-or permit-claimants to put forth documentary evidence of their actual losses." *In re Holocaust Victim Assets Litig.*, 413 F.3d at 186. On July 26, 2001, we affirmed. *Id.* at 187. In doing so, we concluded

> that the district court did not abuse its discretion in allocating $800 million to the "Deposited Assets" class. The existence and estimated value of the claimed deposit accounts was established by extensive forensic accounting. In addition, these claims are based on well-established legal principles, have the ability of being proved with concrete documentation, and are readily valuated in terms of time and inflation. By contrast, the claims of the other four classes are based on novel and untested legal theories of liability, would have been very difficult to prove at trial, and will be very difficult to accurately valuate. Any allocation of a settlement of this magnitude and comprising such different types of claims must be based, at least in part, on the comparative strengths and weaknesses of the asserted legal claims.

Id. at 186. We also found no "legal merit" in the claims that the *cy pres* doctrine had been inappropriately applied to the Looted Assets Class and that members of that class "should be allowed to provide proof of their actual loss of property." *Id.*

On August 19, 2002, the Special Master informed the District Court that, "[a]s a result of unanticipated interest and other income to the Settlement Fund ... there are sufficient excess funds to provide for supplemental distributions to class members." Letter of Judah Gribetz, Special Master, Holo-

caust Victim Assets Litigation, to The Hon. Edward R. Korman, Aug. 19, 2002, at 1. The Special Master ***143** proposed that the allocation to the Looted Assets Class be increased by $45 million, and that "[t]he proportions allocated among various 'Victim or Target' groups and geographic regions ... remain the same." *Id.* at 3-4.

In a motion dated September 23, 2002, the HSF objected to the Special Master's proposed supplemental distribution, "principally advocating for an allocation of a *proportionate* (25%) share of *all* unclaimed funds-including those now available and those that will be remaining from the $800 million set aside to pay bank account claims-for the needs of U.S. Survivors." *In re Holocaust Victim Assets Litig.*, Objections of U.S. Survivor Groups to Special Master's Recommendations Concerning Allocation of Accumulated Interest on Settlement Funds, No. CV 96-4849, at 3 (E.D.N.Y. Sept. 23, 2002) (footnote omitted) (emphasis in original).

On September 25, 2002 the District Court adopted the Special Master's recommendation. *In re Holocaust Victim Assets Litig.*, No. CV 96-4849 (E.D.N.Y. Sept. 25, 2002) (ordering a 45% increase in "annual requests for funding from the three administrative agencies distributing humanitarian *cy pres* funds to needy members of the Looted Assets Class").

In a memorandum of September 28, 2002, the District Court informed the HSF that its objection was received only after the District Court's order had been filed, and that the objection was, in any event, untimely. *In re Holocaust Victim Assets Litig.*, No. CV 96-4849 (E.D.N.Y. Sept. 28, 2002) (handwritten memorandum on a copy of HSF's objection). The HSF then moved for reconsideration.

On September 10, 2003, the HSF also moved in the District Court for an order "authorizing the *immediate* allocation of the sum of $200 million to be used to meet the human services needs of Class members who are currently being under served, or who would be eligible to be served, by the existing

Jewish social service agencies in the United States, Israel, Europe, and other places where Survivors are in need." *In re Holocaust Victim Assets Litig.*, Motion for Immediate Interim Distribution of Swiss Settlement Proceeds, No. CV 96-4849, at 1 (E.D.N.Y. Sept. 10, 2003). The HSF requested that a "minimum" of 25% of that allocation-that is, $50 million-be earmarked for Holocaust survivors residing in the United States. *Id.* (emphasis omitted).

On October 2, 2003, the Special Master submitted to the District Court a report estimating that an additional $60 million was "available for immediate distribution for the benefit of needy victims or targets of Nazi persecution." *In re Holocaust Victim Assets Litig.*, Special Master's Interim Report on Distribution and Recommendation for Allocation of Excess and Possible Unclaimed Residual Funds, No. CV 96-4849, slip op. at 3 (E.D.N.Y. Oct. 2, 2003). The Special Master then proposed that the entire $60 million be allocated wholly to the Looted Assets Class "in accordance with the *cy pres* principles that have successfully governed the administration of the initial $100 million allocation and distribution to the Looted Assets Class in 2001, and the first supplemental allocation and distribution of $45 million in 2002." *Id.* at 4 (footnote omitted). In other words, an additional $54 million (90% of the $60 million allocation) would be allocated to needy Jewish survivors, and 75% of that amount would be earmarked for needy Jewish survivors in the FSU.

The HSF filed its objection to the Special Master's recommendation on October 31, 2003, urging the Court to adopt instead the HSF's proposal of September 10, 2003. *In re Holocaust Victim Assets Litig.*, Response of Holocaust Survivors Foundation-USA,***144** Inc. to Special Master's Interim Recommendation, No. CV 96-4849 (E.D.N.Y. Oct. 31, 2003). According to the HSF, "[t]he Special Master's recommendation embodies a standardless 'rough justice' paradigm in which the extreme conditions under which many elderly Nazi victims in the FSU live is deemed to override the rights of all

other Looted Assets class members who also have economic need and cannot obtain vital home and health care and emergency services in their declining years." *Id.* at 3.

On November 17, 2003, the District Court adopted the Special Master's October 2, 2003 recommendation, allocating an additional $60 million to the Looted Assets Class and ordering that such funds "be allocated proportionately among the same 'Victim or Target' groups and the same geographic regions enunciated in" the original Special Master's Proposal. *In re Holocaust Victim Assets Litig.*, No. CV 96-4849, slip op. at 2 (E.D.N.Y. Nov. 17, 2003). The District Court's November 17, 2003 order noted that the HSF's objection was overruled, for reasons that would be explained in "an opinion to follow." *Id.*

II. Opinion of the District Court

In a memorandum and order filed on March 9, 2004, the District Court addressed the merits of the HSF's objections to supplemental allocations ordered by the Court on September 25, 2002 and November 17, 2003. *In re Holocaust Victim Assets Litig.*, 302 F.Supp.2d 89 (E.D.N.Y.2004). The District Court summarized the substance of HSF's objections as follows:

> [The HSF] agrees that funds allocated to the Looted Assets Class should be distributed through a *cy pres* distribution to the neediest survivors, but only after distributing the funds *pro rata* among countries. Put differently, [the HSF] argues that a survivor community in a given country should be allocated (for the benefit of its neediest survivors only) a percentage of the Looted Assets Class funds equal to whatever percentage of the world survivor community it represents.

Id. at 95.

The Court then provided an extensive account of historical reasons why "the population of *needy* survivors is distributed quite differently than the population of survivors." *Id.* at

98 (emphasis in original). According to the most reliable demographic statistics available to the District Court, approximately 19% to 27% of Holocaust survivors live in the FSU, while 14% to 19% live in the United States. *Id.* at 97. Yet, of the over $53 billion in restitution funds distributed since the end of the Second World War, "$14.8 billion, or just shy of 28% ... has gone to survivors in the United States," while "just under $444 million, or 0.8% ... has gone to survivors in the FSU." *Id.* at 98 (emphasis omitted).

Quite apart from this history of disproportionate restitution efforts, the lives of survivors in the FSU have differed drastically from the lives of survivors in Western societies. As the District Court aptly summarized, "[a]s brutal as life was under Communism, ... the situation for many elderly pensioners has become even worse with its collapse." *Id.* at 99. In part because "the personal savings of many individuals in the FSU were wiped out by hyperinflation after the collapse of the Soviet Union, ... approximately 60% of all elderly now living in the FSU are impoverished." *Id.* (internal quotation marks omitted).

The District Court then marshaled further statistical evidence and first-hand accounts to demonstrate that the "financial situation of individual survivors in the FSU ... is woeful in comparison to that of ***145** survivors in the United States." *Id.* at 100-07. For example,

> [t]he survivor community in the FSU constitutes between 32% and 40% of the total Jewish population in the FSU. The survivor community in the United States, on the other hand, makes up only 2.5% of the Jewish population. While at first blush this statistic may appear insignificant, ... "[t]he high percentages [of survivors] in the FSU mean that there is a comparatively small Jewish community available to support victims." This problem is exacerbated by the fact that while 56% of survivors in the United States are married and 96% have children, only 41% of survivors in the FSU are

> married and only 44% have children. In sum, family and community support networks are stretched thin in the FSU.

Id. at 100 (alterations in original) (citations omitted) (quoting and citing Andrew Hahn et al., *Jewish Elderly Nazi Victims: A Synthesis of Comparative Information on Hardship and Need in the United States, Israel, and the Former Soviet Union* (2004) (a report prepared for the American Jewish Joint Distribution Committee by researchers from Brandeis University), *available at* http://www.cmjs.org/files/JDCBrandeisReport01-26-04Final.pdf).

The District Court likewise emphasized the significant differences in the social safety nets available to survivors residing in the FSU relative to those residing in the United States. *Id.* at 100-07. Thus, the District Court acknowledged that a significant number of survivors in the United States are poor, but found that "the need faced [in the United States] is of a different kind than that faced by survivors in the FSU," where 55% of the settlement funds distributed by the American Jewish Joint Distribution Committee ("JDC") had been spent on hunger relief programs. *Id.* at 102, 106. The District Court concluded that the 135,000 identified destitute Jewish Holocaust victims in the FSU suffer from "particularly" acute need; indeed, they are "barely surviving." *Id.* at 99.

Finally, the District Court overruled the HSF's objections to the calculations underlying the geographic allocation of settlement funds:

> Of the Looted Assets and excess funds, I have thus far allocated to needy survivors in the FSU 18.75 times the amount I have allocated to needy survivors in the United States. If I were to assume that every needy survivor deserved the same amount of money, that would mean that there should be 18.75 times more

> needy survivors in the FSU than there are in the United States. There are at least that many. The JDC has clearly documented at least 135,000 survivors in the FSU who are in desperate need, more than the entire survivor population in the United States. Thus, even in [the HSF's] terms, the 18.75 number would be subject to challenge only if there were more than 7,200 survivors in the United States who are in comparable distress. The empirical evidence that has been produced has not identified 7,200 such people.

Id. at 108.

After overruling the HSF's objections on the merits, the District Court inquired whether, in any event, the HSF had standing to raise such objections. The Court held that the HSF lacked standing, principally because the HSF failed to prove that it is a "membership corporation" with "standing to litigate on behalf of its members." *Id.* at 115-17.

The HSF, joined by several individuals and organizations, now appeals the District Court's March 9, 2004 memorandum and order.

***146 Discussion**

Before considering the merits of appellants' challenge to the District Court's allocation and distribution orders,[13] it is

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[13] Lead Settlement Counsel challenges the standing of all appellants to appeal the District Court's orders. Although the District Court held that the HSF lacked standing, the standing of other appellants was neither raised before, nor addressed by, the District Court. Upon review of the record of this case, we are satisfied that at least one individual appellant, "G.K.," a needy Holocaust survivor residing in the United States, has met minimal standing requirements. We would ordinarily remand this cause to the District Court for a determination (1) whether appellants (other than the HSF and "G.K.") have standing to appeal from the District Court's orders; and (2) whether our decision that "G.K." has standing affects the standing of the HSF because "G.K." may be a member of an organization that, in turn, may be a member of the HSF. However, such a remand is not necessary here, since we address the claims of "G.K." on the merits, and

helpful to specify the aspects of the District Court's opinion that appellants are *not* challenging. Appellants do not dispute that the District Court may, as a general matter and in the appropriate circumstances, distribute settlement proceeds to the neediest class members, pursuant to the *cy pres* doctrine. *See, e.g.,* Appellants' Br. at 33. Rather, they question whether the District Court exceeded the bounds of that general principle in this case by allocating funds partly on the basis of geographic disparities in the provision of basic needs.

Appellants also do not dispute the findings that underlie the District Court's initial decision to distribute the settlement funds in this case to the neediest class members-namely, the findings that (1) a case-by-case valuation of Looted Assets Class members' claims, "would have resulted in an unwieldy and enormously expensive apparatus," and (2) "[a] *pro rata* distribution would have resulted in the payment of literally pennies to each of the millions of individuals who would fall into" the Looted Assets Class. *In re Holocaust Victim Assets Litig.*, 302 F.Supp.2d at 96 (internal quotation marks omitted). In any event, we have previously affirmed the District Court's use of a *cy pres* remedy in this case.

Instead, appellants ask us to review only the *manner* in which the *cy pres* distribution of funds to the neediest Looted Assets Class members was accomplished by the District Court-namely, they ask us to consider whether the District Court properly allocated the funds earmarked for needy Jewish Holocaust survivors by directing 75% of those funds to the FSU and only 4% to the United States.

As we recognized in an earlier appeal related to this litigation, "[t]he district court has broad supervisory powers with respect to the administration and allocation of settlement

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the merits of her claim are identical to the merits of other appellants' claims. *See In re Holocaust Victim Assets Litig.*, 225 F.3d 191, 197 n. 7 (2d Cir.2000) (declining to remand the question of a party's standing to the district court when the merits of that party's claims were fully adjudicated in the course of addressing claims brought by parties with standing).

funds, and we 'will disturb the scheme adopted by the district court only upon a showing of an abuse of discretion,' " *In re Holocaust Victim Assets Litig.*, 413 F.3d at 185 (citing *Beecher v. Able*, 575 F.2d 1010, 1016 (2d Cir.1978), and quoting *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 179, 181 (2d Cir.1987)). "A district court 'abuses' or 'exceeds' the discretion accorded to it when (1) its decision rests on an error of law (such as application of the wrong legal principle) or a clearly erroneous factual finding, or (2) its decision-though not necessarily the product of a legal error or a clearly erroneous factual finding-cannot ***147** be located within the range of permissible decisions." *Zervos v. Verizon N.Y., Inc.*, 252 F.3d 163, 169 (2d Cir.2001) (footnotes omitted).

Appellants argue that the District Court inappropriately relied on geographic differences in Holocaust survivors' needs because these needs are largely a function of historical events that followed the injuries inflicted by the Nazi regime and by the Swiss bank defendants. We recognize that, in a traditional class action brought to remedy an injury that had occurred shortly before the initiation of suit, the amounts allocated among claimants would normally vary primarily by the effect of the injury upon different claimants, rather than by the current financial needs of the claimants. But, in the circumstances presented by this case, we think the equitable principles of the *cy pres* doctrine permit the geographic variation that the District Court adopted. As that Court pointed out, survivors residing in the FSU had been cut off by the Soviet regime from the ten prior major efforts at Holocaust reparations, and of the $53 billion that has been provided to Holocaust victims through these prior efforts, $14.8 billion or 28% has gone to survivors in the United States and only $444 million or 0.8% has gone to survivors in the FSU. *See In re Holocaust Victim Assets Litig.*, 302 F.Supp.2d at 98. This extraordinary circumstance understandably prompted the District Court to consider the variation in *current* financial need in making the geographic allocation.

Appellants further contend that the District Court exceeded its discretion because "[n]o court" has previously allocated settlement funds by consulting the same "factors" the District Court applied here. Appellants' Br. at 32. The "factors" in question include the history of previous compensation efforts, material deprivations associated with decades of life under a Communist regime and the effects of that regime's collapse, and access to family and community support networks. *In re Holocaust Victim Assets Litig.*, 302 F.Supp.2d at 97-107. Like appellants, we are unaware of any other court that has relied on this particular combination of factors in allocating settlement funds. But, unlike appellants, we believe that consideration of these factors, in the circumstances presented, was entirely appropriate and well within the wide discretion afforded to the District Court.

Appellants also argue that the District Court's "totally subjective" allocation of settlement funds exceeded the bounds of proper discretion set forth in two appellate decisions concerning the scope of the *cy pres* doctrine, *In re Airline Ticket Commission Antitrust Litigation*, 268 F.3d 619 (8th Cir.2001) ("*Airline Ticket Commission I* "), and *In re Airline Ticket Commission Antitrust Litigation*, 307 F.3d 679 (8th Cir.2002) ("*Airline Ticket Commission II* "). Appellants' Br. at 32-33.

This contention is without merit. In *Airline Ticket Commission I*, the Eighth Circuit held that a *cy pres* allocation of settlement funds exceeds the bounds of the District Court's discretion when the district court (1) fails to offer any "indication" of having "carefully weighed all of the considerations" relevant to the allocation; and (2) makes "no findings" in connection with its distribution of funds. 268 F.3d at 626 (internal quotation marks omitted). Upon review of the record of this case, we find that the opinions of the District Court and the reports of the Special Master are not susceptible to the same criticisms. Indeed, the allocation challenged by appellants here-earmarking 75% of Looted Assets Class funds allocated to all needy Jewish survivors to needy Jewish survivors

in the FSU-was rendered after the District Court carefully weighed all relevant considerations and ***148** made numerous factual findings. *See In re Holocaust Victim Assets Litig.*, 302 F.Supp.2d at 97-107. Under the standard set forth in *Airline Ticket Commission I*, the District Court acted well within its discretion, and we find no support in the record of this case for appellants' suggestion that the Court acted in a "totally subjective" manner.

In *Airline Ticket Commission II*, the Eighth Circuit again reversed the district court's allocation of the same settlement funds because, on remand, the district court had allocated the funds to an entity that could not "claim any relation to the substantive issues" of the underlying litigation. 307 F.3d at 683. Furthermore, an alternative allocation rejected by the district court in *Airline Ticket Commission II* "would [have] relate[d] directly" to the injuries alleged in that case. *Id.* Contrary to appellants' view, the circumstances of *Airline Ticket Commission II* bear no resemblance to the instant litigation. The suffering of Holocaust survivors everywhere relates directly to the looting they suffered at the hands of the Nazis and their accomplices. More significantly, the claims of needy American Holocaust survivors, whose interests the HSF purports to advocate, are no more related to the underlying litigation against Swiss banks than the claims of needy survivors in the FSU. In short, appellants' reliance on the *Airline Ticket Commission* decisions is entirely misplaced.

Finally, we inquire whether the District Court acted within the bounds of its discretion by rejecting the HSF's proposed alternative to the District Court's allocation methodology. The HSF, it must be recalled, challenges the District Court's decision to distribute funds in accordance with the geographic distribution of *needy* Holocaust survivors. Instead, the HSF proposes the following methodology: (1) "allot[ ] funds geographically," presumably in proportion to *total* survivor population and without regard to need; and (2)

"within" each "geographical region," distribute funds "according to need." Appellants' Br. at 33.

There are at least two reasons why the District Court did not exceed its discretion by rejecting the HSF's proposed allocation methodology. First, the HSF's methodology implies that Jewish Holocaust survivors who reside in the United States today are legally entitled to a particular share of the settlement fund based on their *total* number (rather than the number of *needy* survivors among them). We find no legal or equitable support for this view. Members of the Looted Assets Class (whether they currently reside in the United States, the FSU, or elsewhere) were persecuted sixty years ago, principally in Europe, but it is well-documented that their experiences in the intervening decades have differed dramatically. As the Lead Settlement Counsel aptly argues, "[t]he accident of current residence is utterly unconnected with the events giving rise to this litigation, and is irrelevant to any principled basis for allocating the funds." Lead Settlement Counsel's Br. at 47.

Second, the District Court articulated a compelling equitable reason to reject the HSF's proposed allocation methodology. As a logical matter, this methodology "is tailored to benefit individuals who are a part of a small group of needy survivors within a large nationwide survivor population." *In re Holocaust Victim Assets Litig.*, 302 F.Supp.2d at 95. Needy survivors in the United States are precisely the group that stands to gain, since the United States' share of *needy* Holocaust survivors is substantially less than United States' share of *all* Holocaust survivors. *Id.* But from the perspective of the *worldwide* population of needy Holocaust survivors-the population for the benefit of which the funds allocated to the Looted Assets Class ***149** are being distributed-there is nothing equitable about an allocation methodology that provides the "relatively few needy survivors" in the United States "with a disproportionate benefit solely because of the overall size of the survivor community in the United States." *Id.* at

109. Accordingly, the District Court concluded that the HSF's allocation methodology is "arbitrary and unreasonable." *Id.* We need not decide today whether appellants' proposal is indeed so inequitable as to be "arbitrary and unreasonable," for our standard of review is far more deferential. We may merely inquire whether the District Court had the discretion to adopt a different allocation plan. For the reasons set forth above, we hold that it did.[14]

Conclusion

The allocation and distribution of this historic settlement began with "a desire to spare Holocaust survivors from being forced into an adversarial relationship that would have required them to squabble over a settlement fund that, while substantial, is necessarily insufficient to do full justice" to the victims of Nazi persecution. *In re Holocaust Victim Assets Litig.*, Submission of Lead Settlement Counsel in Support of the Special Master's Proposed Plan of Allocation and Distribution of Settlement Proceeds, No. CV 96-4849, at 3 (E.D.N.Y. Nov. 20, 2000).

More than six years after the creation of the settlement fund, the desired harmony among its beneficiaries has not been achieved. Indeed, the instant appeal is but one of a series of challenges to the District Court's allocation and distribution orders. Yet the objections raised by appellants here—and the zeal with which these objections have been pur-

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[14] One of plaintiffs' class counsel in this litigation, Robert Swift, has requested that we remand this cause to the District Court "with instructions barring any further *cy pres* distributions until [the District Court] has rendered a decision as to the final distribution" of all Deposit Assets Class funds likely to remain unclaimed-funds Swift estimates at $600 million. Appellee Class Br. at 4, 9. At this time, it is neither necessary nor appropriate for us to interfere in the discretionary judgments of the District Court in the manner Swift suggests. Without commenting on the merits of Swift's request, we deny it, but we do so without prejudice to a similar request being made to the District Court in due course.

sued[15]—have in no way undermined the thoughtful analysis and scrupulous fairness with which Chief Judge Korman has approached every step of this litigation.

We have carefully considered all arguments raised by appellants and we find each of them to be without merit. Accordingly, the District Court's memorandum and order of March 9, 2004 is hereby affirmed.

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[15] The HSF's appellate brief averts to the District Court's "flawed judicial process," referring principally to (1) the District Court's approval of the Settlement Agreement before adopting a plan for distributing and allocating settlement funds; and (2) alleged "assurances by the Lead Class Counsel and the court that the initial allocation imbalance would be rectified with subsequent distributions of larger amounts" for the benefit of survivors residing in the United States. Appellants' Br. at 26. The HSF characterizes these purported procedural irregularities as "examples" by which this Court's "examination" of the merits of this appeal would be "informed." *Id.* at 17, 20.

Upon carefully reviewing the record of this case, we find no evidence whatsoever of a "flawed judicial process." To the contrary, the careful consideration that the District Court, the Special Master, and the Lead Settlement Counsel have accorded to every step in the allocation and distribution of this historic settlement has been exemplary.

APPENDIX B

105 F.Supp.2d 139

United States District Court,E.D. New York.

In re HOLOCAUST VICTIM ASSETS LITIGATION.

This Document Relates to All Cases.

Nos. 96 Civ. 4849 (ERK)(MDG), 99 Civ. 5161 and 97 Civ. 461.

July 26, 2000.

As Corrected Aug. 2, 2000.

MEMORANDUM & ORDER

KORMAN, Chief Judge.

I address here the legal issue of the fairness of the $1.25 billion settlement of the Holocaust Victim Assets Litigation against two leading Swiss banks. The words of Ernest Lobet, a survivor of the Holocaust, provide the best summary of the conclusion that I reach after the analysis to follow:

> I have no quarrel with the settlement. I do not say it is fair, because fairness is a relative term. No amount of money can possibly be fair under those circumstances, but I'm quite sure it is the very best that could be done by the groups that negotiated for the settlement. The world is not perfect and the people that negotiated I'm sure tried their very best, and I think they deserve our cooperation and ... that they be supported and the settlement be approved.

Transcript of Fairness Hearing, November 29, 1999, at 146.

Background and Procedural History

I. *Nature of the Lawsuit and Proposed Settlement*

Beginning in late 1996 and early 1997, plaintiffs filed a series of class action lawsuits against defendants. The original class action complaints were amended and refiled in July

1997 as four separate actions, consolidated under Master Docket No. 96 Civ. 4849: *Sonabend, et al. v. Union Bank of Switzerland, et al.; Trilling-Grotch, et al. v. Union Bank of Switzerland, et al.; Weisshaus, et al. v. Union Bank of Switzerland, et al.;* and *World Council of Orthodox Jewish Communities, Inc., et al. v. Union Bank of Switzerland, et al.*

Plaintiffs alleged that, before and during World War II, they were subjected to persecution by the Nazi regime, including genocide, wholesale and systematic looting of personal and business property and slave labor. Plaintiffs alleged that, in knowingly retaining and concealing the assets of Holocaust victims, accepting and laundering illegally obtained Nazi loot and transacting in the profits of slave labor, Swiss institutions and entities, including the named defendants, collaborated with and aided the Nazi regime in furtherance of war crimes, crimes against humanity, crimes against peace, slave labor and genocide. Plaintiffs also alleged that defendants breached fiduciary and other duties; breached contracts; converted plaintiffs' property; enriched themselves unjustly; were negligent; violated customary international law, Swiss banking law and the Swiss commercial code of obligations; engaged in fraud and conspiracy; and concealed relevant facts from the named plaintiffs and the plaintiff class members in an effort to frustrate plaintiffs' ability to pursue their claims. Plaintiffs sought an accounting, disgorgement, compensatory ***142** and punitive damages, and declaratory and other appropriate relief.

In May 1997, defendants filed motions to dismiss the litigation, or, in the alternative, for a stay. The motions, supported by expert affidavits, argued that the actions should be dismissed because plaintiffs failed to state claims under Swiss and international law, failed to join indispensable parties, lacked personal and subject matter jurisdiction, and lacked standing. Defendants also argued that I should abstain from adjudicating plaintiffs' claims in favor of ongoing non-judicial initiatives to redress all of plaintiffs' claims, and argued that

Switzerland, not the United States, was the proper forum for plaintiffs to pursue the relief to which they believed they were entitled. I heard lengthy argument on defendants' motions on July 31, 1997. At argument, I voiced concerns about the viability of certain causes of action and I identified several additional legal issues that the parties subsequently addressed in post-hearing memoranda of law. While the motions to dismiss were pending, the parties engaged in discussions resulting in a Settlement Agreement, which made it unnecessary for me to decide the motions.

The settlement discussions were facilitated, initially, by former United States Under Secretary of State, now Deputy Secretary of Treasury, Stuart Eizenstat. Subsequently, I became intimately involved in the settlement discussions that led to an agreement in principle in August 1998. The key terms of the proposed Settlement Agreement are as follows:

1. *Settlement Fund:* Defendants have agreed to pay $1.25 billion, in four installments, over the course of three years. Pursuant to the terms of the Settlement Agreement, defendants paid the first and second installments into an escrow fund on November 23, 1998 and 1999, respectively. As originally set forth in the Settlement Agreement, the two remaining payments were to be made on November 23, 2000 and 2001, respectively. However, the parties have agreed to amend the Settlement Agreement to provide for acceleration of certain payments and modification of the flow of funds between the escrow fund and the settlement fund in order to generate additional interest payments payable to the settlement fund. The additional interest payments are designed to partially defray the cost of the claims process for the Deposited Assets Class, which is defined below.

2. *Defenses Waived:* As part of the settlement, defendants have foregone potentially dispositive legal and factual defenses, including the following: (i) whether this dispute is justiciable, (ii) whether plaintiffs' claims

are barred under applicable foreign law, (iii) whether plaintiffs have standing to assert various claims and (iv) whether the claims are time-barred under applicable statutes of limitation and repose, or by the doctrine of prescription.

3. *Revival of Claims:* The settlement protects class members whose claims may otherwise have been deemed expired under applicable statutes of limitation and repose.

4. *Distribution:* The settlement does not preordain a plan for distribution of the settlement fund. Instead, the settlement sets forth a fair and open mechanism for the development of criteria pursuant to which distribution and allocation determinations will be made.

5. *Settled Claims:* In exchange for the settlement amount paid by the settling defendants, settling plaintiffs and settlement class members have agreed irrevocably and unconditionally to release, acquit and forever discharge certain releasees from any and all claims relating to the Holocaust, World War II and its prelude and aftermath, victims or targets of Nazi persecution, transactions with ***143** or actions of or in connection with the Nazi regime, treatment by the Swiss Confederation or other releasees of refugees fleeing persecution, or any related cause or thing whatever. Certain limited exceptions are detailed in the Settlement Agreement. The settlement resolves not only the cases coordinated as part of the above-captioned proceeding, but also resolves additional related cases, including cases in California and Washington, D.C. captioned *Markovicova, et al. v. Union Bank of Switzerland, et al.*, Case No. C98-2924 (N.D.Cal.), and *Rosenberg, et al. v. Swiss National Bank*, Case No. 1:98-CV-01647 (D.D.C.).

6. *Class Beneficiaries:* The parties agreed that the settlement should benefit generally persons recognized

as targets of systematic Nazi oppression on the basis of race, religion or personal status. Declaration of Burt Neuborne, Esq. (Nov. 5, 1999) ("Neuborne Decl. I") ¶ 23. Accordingly, at the initiative of plaintiffs' Executive Committee, the settlement was explicitly designed to benefit Jews, homosexuals, Jehovah's Witnesses, the disabled and Romani-groups recognized by the United Nations as having been the targets of systematic Nazi persecution on the basis of race, religion or personal status. *Id.* Thus, four of the five settlement classes defined below benefit these targets of Nazi persecution.

Because the defendant banks sought to settle not only the causes of action alleged against them, but were seeking to resolve legal claims against Swiss governmental and business entities, the releases described in the fifth numbered paragraph above included entities that were not named as defendants in this case. *See* Settlement Agreement ¶ 1 (definition of "Releasees"). Also for this reason, at least one of the five settlement classes described below, the Refugee Class, includes victims of Nazi persecution who did not suffer any injury as a direct or indirect result of conduct of the defendant banks or of any Swiss banks.

II. *The Settlement Evaluation Process*

A. *Preliminary Approval and Class Certification*

In an order dated March 30, 1999, I preliminarily approved the proposed settlement and certified five settlement classes under Fed.R.Civ.P. 23(a) and 23(b)(3). The classes certified were the following:

1. *Deposited Assets Class:* The Deposited Assets Class consists of victims or targets of Nazi persecution and their heirs, successors, administrators, executors, affiliates and assigns who have or at any time have asserted, assert or may in the future seek to assert claims against any releasee for relief of any kind whatsoever relating to or arising in any way from deposited assets or any effort to recover deposited assets.

2. *Looted Assets Class:* The Looted Assets Class consists of victims or targets of Nazi persecution and their heirs, successors, administrators, executors, affiliates and assigns who have or at any time have asserted, assert or may in the future seek to assert claims against any releasee for relief of any kind whatsoever relating to or arising in any way from looted assets or cloaked assets or any effort to recover looted assets or cloaked assets.

3. *Slave Labor Class I:* Slave Labor Class I consists of victims or targets of Nazi persecution and their heirs, executors, administrators and assigns who actually or allegedly performed slave labor for companies or entities that actually or allegedly deposited the revenues or proceeds of that labor with, or transacted such ***144** revenues or proceeds through, releasees, and who have or at any time have asserted, assert or may in the future seek to assert claims against any releasee for relief of any kind whatsoever relating to or arising in any way from the deposit of such revenues or proceeds or cloaked assets or any effort to obtain redress in connection with the revenues or proceeds from slave labor or cloaked assets.

4. *Slave Labor Class II:* Slave Labor Class II consists of individuals and their heirs, executors, administrators and assigns who actually or allegedly performed slave labor at any facility or work site, wherever located, actually or allegedly owned, controlled or operated by any corporation or other business concern headquartered, organized or based in Switzerland or any affiliate thereof, and who have or at any time have asserted, assert or may in the future seek to assert claims against any releasee other than settling defendants, the Swiss National Bank, and other Swiss banks for relief of any kind whatsoever relating to or arising in any way from such slave labor or cloaked assets or any effort to obtain redress in connection with slave labor or cloaked assets.

5. *Refugee Class:* The Refugee Class consists of victims or targets of Nazi persecution and their heirs, executors, administrators and assigns who sought entry into Switzerland in whole or in part to avoid Nazi persecution and who actually or allegedly either were denied entry into Switzerland or, after gaining entry, were deported, detained, abused or otherwise mistreated, and who have or at any time have asserted, assert or may in the future seek to assert claims against any releasee for relief of any kind whatsoever relating to or arising in any way from such actual or alleged denial of entry, deportation, detention, abuse or other mistreatment.

B. *Dissemination of Notice*

My grant of preliminary approval and class certification allowed for implementation of the second step in the settlement evaluation process-*i.e.*, dissemination of notice of the proposed settlement and class certification to the settlement classes. *See* Federal Judicial Center, *Manual for Complex Litigation-Third* ("*MCL 3d*") §§ 30.212, 30.41 (1995).

The notice plan, which I approved in an order dated May 10, 1999, was tailored to the unique circumstances of this case; was effective as implemented, as discussed below, in that it provided the best notice practicable under the circumstances in terms of content, format and dissemination; and satisfied due process requirements and Fed.R.Civ.P. 23(c). There is no list of all the members of the settlement classes that would have permitted the notice administrators to send notice exclusively by direct mail to all settlement class members. Instead, I directed settlement class counsel, through four notice administrators, to implement the multi-faceted notice plan, involving, in addition to direct mail utilizing existing lists covering segments of the settlement classes, worldwide publication, public relations (*i.e.*, "earned media"), Internet and grass roots community outreach.

Each of the court-appointed notice administrators oversaw distinct aspects of the notice plan, and their various reports

filed with the court detail the exhaustive efforts undertaken to give all settlement class members an opportunity to learn of their rights, evaluate the basic terms of the proposed settlement and comment, either by submitting correspondence, e-mailing the notice administrators or returning an Initial Questionnaire.

Each element of the notice plan that I approved has been successfully implemented, including the following: (i) world-wide ***145** publication, (ii) press coverage, (iii) an extensive community outreach program, (iv) a direct mail program that included the sending of more than 1.4 million notice packages directly to potential class members in at least 48 countries and (v) an Internet notice effort.

C. Fairness Hearings

The third and final step in the class action settlement evaluation process was a final approval hearing, also known as a "fairness hearing," pursuant to Fed.R.Civ.P. 23(e). I held a fairness hearing in the United States District Court for the Eastern District of New York on November 29, 1999. The hearing was open to all settlement class members. I also conducted and presided (by electronic hookup) over a supplemental fairness hearing that was held in Israel on December 14, 1999. The hearing was open to a random sampling of Israelis who submitted Initial Questionnaires in response to the notice. I have considered the views of the settlement class members presented at these final approval hearings, and through the written correspondence of class members, whether submitted in hard copy or by e-mail.

D. *Subsequent Amendments to the Settlement Agreement*

After preliminary approval, the parties amended the Settlement Agreement and escrow agreement to provide that settling defendants would pay the second installment of the settlement amount into the escrow fund, to permit the escrow agents to authorize disbursements of up to $20 million in the aggregate for payment of certain costs incurred in implementing the settlement, and to permit the escrow agents to author-

ize additional disbursements from the escrow fund for settlement implementation costs, subject to court approval.

The parties have made additional modifications to the Settlement Agreement since its preliminary approval. These modifications will be discussed in the part of this memorandum that addresses the objections and comments to the Settlement Agreement made in response to the notice of proposed settlement. I add this caveat: just as I was ready to release this opinion last week, counsel for the defendant banks threatened to repudiate the modifications because he was unhappy with certain good faith obligations imposed upon the releasees to provide information necessary to allow members of the plaintiff class to obtain the benefits of the Settlement Agreement. I discuss the circumstances of this threat *infra* at 163-66. My initial discussion of the Settlement Agreement assumes that defendants Union Bank of Switzerland and Credit Suisse will act responsibly and adhere to the modifications. If they do not, then, for reasons that I will explain, I will approve the Settlement Agreement without the modifications.

Discussion

"The central question raised by the proposed settlement of a class action is whether the compromise is fair, reasonable and adequate." *Weinberger v. Kendrick,* 698 F.2d 61, 73 (2d Cir.1982). This determination involves consideration of both the process by which the settlement was reached and the substantive terms of the settlement itself. *Id.* at 73-74. I have considered both the procedural fairness of the settlement process, and the overall adequacy and reasonableness of the substantive terms of the proposed settlement, and find that each of these components weighs in favor of final approval.

I. *Procedural Fairness*

I turn first to the procedural component of the fairness determination. This consideration focuses on the "negotiating process by which the settlement was reached." *Weinberger,* 698 F.2d at 73. The process must be examined "in light of

the experience of counsel, the vigor with which the case was prosecuted, and the coercion or collusion that may have marred ***146** the negotiations themselves." *Malchman v. Davis*, 706 F.2d 426, 433 (2d Cir.1983). In particular, a judge ruling on the fairness of a settlement has a fiduciary duty to ensure that the settlement is not the product of collusion. *See In re Warner Communications Securities Litigation*, 798 F.2d 35, 37 (2d Cir.1986). "So long as the integrity of the arm's length negotiation process is preserved, however, a strong initial presumption of fairness attaches to the proposed settlement." *In re NASDAQ Market-Makers Antitrust Litigation*, 187 F.R.D. 465, 474 (S.D.N.Y.1998).

In a class action, the principal impediment to assuring an untainted settlement process is the financial interest of counsel, who may be improperly influenced to accept certain settlement terms, or to accept a settlement at all, thereby "subordinat[ing] the interests of class members to the attorney's own economic self-interest." John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 Colum. L.Rev. 370, 371-72 (2000). As plaintiffs' lead counsel observes, however, such a "divided loyalty" structural concern is absent from this case. Neuborne Decl. I ¶ 28. Key members of the plaintiffs' Executive Committee who negotiated this settlement are providing their services on a *pro bono* basis, at most requesting that, in lieu of attorneys' fees, payments be made to law schools to endow Holocaust Remembrance Chairs in honor of class members who did not survive, and to foster international human rights law designed to prevent similar human tragedies in the future. *Id.* Numerous lawyers, including plaintiffs' lead settlement counsel, have waived all attorneys' fees. Those relatively few members of the plaintiffs' Executive Committee who are seeking fees personally have agreed to limit their fee applications to the traditional "civil rights" standard of lodestar for time actually expended that materially advances the litigation, and all fees are capped at no more than 1.8% of

the settlement fund, with discretion to award a lower sum. *Id.*

Moreover, based upon my extensive personal involvement in the process, I know that the compromise was reached as the result of lengthy, well-informed and arm's-length negotiations by competent and dedicated counsel who provided loyal and effective legal representation to all parties. Counsel for the plaintiff settlement classes are experienced plaintiffs' advocates and class action lawyers. One could not assemble a more capable group. Among the lawyers for the plaintiffs who are serving without fee are Professor Burt Neuborne of New York University Law School, a brilliant scholar and advocate, who developed the class's legal theories and who presented legal argument on behalf of plaintiffs, and Melvyn H. Weiss and Michael D. Hausfeld, leading members of the class action bar, who ably led plaintiffs' negotiating team. While I have independently evaluated the fairness of the settlement, the unanimous support of this group in favor of final approval is entitled to great weight. *See NASDAQ*, 187 F.R.D. at 474 (where court is satisfied that negotiations were conducted at arm's length and in good faith, " 'great weight' is accorded to the recommendations of counsel, who are most closely acquainted with the facts of the underlying litigation" (citation omitted)).

II. *Substantive Fairness*

I now turn to the substantive component of the fairness determination. This consideration generally is evaluated by reference to the list of specific factors identified in *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 463 (2d Cir.1974). These factors, all or some of which may be relevant, depending on the case, include

> (1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the ***147** risks of maintaining the class action

> through the trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

Id. (internal citations omitted). While I do not consider each of these factors in the order in which they are set forth in *Grinnell,* I address a number of them in the following discussion. The remaining factors, to the extent they are relevant to this case, are addressed in the context of my discussion of the various objections and comments raised concerning the Settlement Agreement. *See infra* § III. The *Grinnell* factors weigh heavily in favor of a finding of substantive fairness.

I begin by noting that, as of May 8, 2000, some 550,000 Initial Questionnaires had been received from class members worldwide, Settlement Class Counsel's Update on Notice Administration (June 15, 2000) ¶ 4, suggesting a widespread interest in participation in the settlement. Approximately 32,000 letters had been received, only approximately 243 of which commented upon or objected to the settlement, and approximately 448 of which contained comments on the plan of allocation or the claims process. *Id.* ¶¶ 5-6. Approximately 401 opt-out requests had been received, a few of which have since been withdrawn, and a percentage of which were from persons who are not class members or who simply did not understand the purpose or nature of the request. *Id.* ¶ 8. Correspondence is still being received by the notice administrators, consisting almost exclusively of Initial Questionnaires and comments on the allocation and distribution of settlement funds.

The above figures help demonstrate that the response of the classes has been overwhelmingly positive, as the vast majority of class members responding to the notice are interested in participating in the settlement, and only a tiny fraction of class members has expressed dissatisfaction with its terms.

In addition to the positive response of class members themselves, there is virtually unanimous worldwide support for the settlement from Jewish and Holocaust survivors' organizations, many of whom have executed written endorsements of the settlement. They include the Agudath Israel World Organization, Alliance Israelite Universelle, the American Gathering/Federation of Jewish Holocaust Survivors, the American Jewish Committee, the American Jewish Congress, the American Jewish Joint Distribution Committee, the Anti-Defamation League, B'nai B'rith International, the Centre of Organizations of Holocaust Survivors in Israel, the Conference on Jewish Material Claims Against Germany, the Council of Jews from Germany, the European Council of Jewish Communities, the Holocaust Educational Trust, the Jewish Agency for Israel, the Simon Wiesenthal Center, the World Jewish Congress and the World Zionist Organization. In addition to those groups that have expressly endorsed the settlement, various others, including the Jehovah's Witnesses, Disability Rights Advocates, the International Gay and Lesbian Association and several groups representing the interests of the Romani (as well as the Sinti, who are a subgroup of the Romani) have implicitly endorsed the settlement by submitting proposals for the allocation and distribution of the settlement funds. Indeed, Roman Kwaitkowski, who is the president of the Polish Association of Roma, appeared at the fairness hearing to express his appreciation for the fact that "this time, nobody forgot about us." Transcript of Fairness Hearing, November 29, 1999, at 144-45.

Former United States Senator Alfonse D'Amato, who participated in the settlement negotiations as an advocate for Holocaust victims, also has concluded that the settlement is eminently fair and brings closure to the questions raised about the ***148** role of Switzerland during World War II. Similarly, New York City Comptroller Alan Hevesi, who led a group of state and local public finance officials that monitored the ne-

gotiations between the parties, has publicly stated that the settlement is fully fair, reasonable and adequate.

The United States, which participated actively in settlement discussions over a period of many months, through Deputy Treasury Secretary Eizenstat, has expressed its "unqualified support for the parties' class action settlement" and endorsed it "as fair, reasonable and adequate and unquestionably in the public interest." Transcript of Fairness Hearing (Nov. 29, 1999) at 27 (comments of James Gilligan, U.S. Department of Justice, on behalf of the United States). Mr. Gilligan continued as follows:

> The United States supports approval of the settlement the parties have reached. It is fair and just and promotes the public interest, as expressed in the policy that the United States government has pursued for the past four years. Because the parties reached for common ground rather than prolong their difference[s], the elderly victims of the Holocaust will receive the benefits of this settlement in their lifetime and much more quickly than would have been possible had the litigation continued.
>
> But of equal importance, the United States regards this settlement as an excellent example of how cooperation and the will to fulfil[l] a moral obligation can lead to voluntary resolution of disputes over Holocaust-era claims.
>
> The government anticipates that the settlement here, by force of its example, will promote the U.S. policy of negotiated settlement in other cases and countries where Holocaust victims' claims for restitution have not yet been resolved. In particular, the United States is hopeful that this settlement will add a sense of urgency and possibility to resolving the pending class action claims of slave and forced laborers who can no longer wait for years for justice to be done.

Id. at 31-32. Mr. Gilligan's prediction that the present settlement would serve as a catalyst for a negotiated agreement of the claims of slave and forced laborers has proven accurate. On March 23, 2000, a final agreement was reached concerning the allocation of an even more substantial settlement fund-approximately $5 billion-in a related litigation on behalf of victims of Nazi slave and forced labor policies, some of whom are also members of the slave labor classes here.

I note that the adequacy and reasonableness of the settlement must be measured against the practical alternative to the settlement in the real world. The alternative to this settlement was prolonged, complex and difficult litigation, in which plaintiffs' chance of success as a class was uncertain. The age and health of many of the class members also presses for a prompt resolution. Because of the passage of time, the destruction of records, and the death of most of the percipient witnesses, the potential amount of damages plaintiffs might have recovered, even if they had been able to prevail in litigation, would have been extremely difficult to calculate with precision.

Defendants raised substantial questions regarding plaintiffs' ability to state claims under either international or state law, at least with respect to some of the claims. Significant and non-frivolous questions were also raised by defendants in their motions to dismiss, including questions regarding the justiciability of some of plaintiffs' claims. Such concerns have resulted in the dismissal of Holocaust-era claims in two recent cases decided in New Jersey. *See Iwanowa v. Ford Motor Co.*, 67 F.Supp.2d 424 (D.N.J.1999); *Burger-Fischer v. DeGussa AG*, 65 F.Supp.2d 248 (D.N.J.1999). I take no position regarding whether these cases were correctly decided, or whether they would even apply here. Instead, I cite them as a reality check for those objectors who believe that ***149** strong moral claims are easily converted into successful legal causes of action. Judge Kram stated it well in her opin-

ion in *In re Austrian and German Bank Holocaust Litigation*, 80 F.Supp.2d 164, 177 (S.D.N.Y.2000), in which she observed:

> It goes without saying that the events which form the backdrop of this case make up one of the darkest periods of man's modern history. Those persecuted by the Nazis were the victims of unspeakable acts of inhumanity. At the same time, however, it must be understood that the law is a tool of limited capacity. Not every wrong, even the worst, is cognizable as a legal claim. Indeed, a number of obstacles stand in the path of plaintiffs' claims in this case.

These words apply with equal force here.

In accepting both the $1.25 billion settlement figure and the defendant banks' demand for broad releases as a fair and reasonable settlement of this class action, plaintiffs' counsel took cognizance of these considerations and balanced the powerful legal and moral claims of the members of the plaintiff classes against (i) the defendant banks' vigorous defense of this action, including the prospect of extensive appellate delays before any judgment could be enforced; (ii) the intransigence of the government of Switzerland and the Swiss National Bank in refusing to contribute to the settlement fund, and in interposing obstacles to the effective prosecution of plaintiffs' legal claims; (iii) the litigation uncertainties surrounding plaintiffs' claims against the defendant banks, especially the difficulty in gaining access to the Swiss banking records needed to establish plaintiffs' claims; (iv) the need for speedy distribution of funds to aged victims, many of whom are in great distress; and (v) the substantial legal and factual uncertainties that would have complicated effective pursuit of legal claims against the Swiss National Bank, the Swiss government and the remaining non-party releasees. Neuborne Decl. I ¶ 6. They came to the conclusion that while, in a perfectly just world, plaintiffs should have received a far greater sum, in the real world, a recovery of $1.25 billion in return

for broad releases was the best that dedicated and competent counsel could achieve under the circumstances of this case. *Id.* I agree.[1]

III. *Objections and Comments*

I have considered all of the objections and comments expressed by settlement class members and others at the fairness hearings and through independent submissions to the court. In addition, because I participated extensively in the settlement negotiation process, I am intimately familiar with the competing interests of, and concerns that have been expressed by, persons with an interest in the subject matter of this litigation. These objections and comments do not warrant denial of the motion for final approval.

A. *Deferring Notice of the Proposed Plan of Allocation and Distribution Until After Final Approval of the Settlement Agreement*

The Settlement Agreement provides for the appointment of a Special Master "to develop a proposed plan of allocation and distribution of the Settlement Fund, employing open and equitable procedures to ensure fair consideration of all proposals for allocation and distribution." Settlement Agreement ¶ 7.1. Under the Settlement Agreement, the Special Master, as a neutral third party, is to consider all suggestions regarding allocation and distribution directly from the class, without relying upon intermediating representatives, such as settlement class counsel or settlement class representatives. The Special ***150** Master will then take that direct input and present a draft plan. That plan will be publicized, and class members will have an opportunity to communicate directly with me regarding it, again, without any intermediaries to di-

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[1] I do not and need not "decide the merits of the case or resolve [the] unsettled legal questions" it presents. *Carson v. American Brands, Inc.*, 450 U.S. 79, 88 n. 14, 101 S.Ct. 993, 998-99 n. 14, 67 L.Ed.2d 59 (1981). Instead, I need only "weigh the likelihood of success by the plaintiff class against the relief offered by the Settlement Agreement[ ]." *Marisol A. v. Giuliani*, 185 F.R.D. 152, 164 (S.D.N.Y.1999).

lute the class members' direct influence. Their comments will be addressed and/or incorporated in a final plan. I have appointed Judah Gribetz, Esq., as Special Master in this case.

Mr. Gribetz is an extraordinarily able lawyer with a long record of distinguished public service. He has served as Counsel to the Governor of the State of New York and as Deputy Mayor of the City of New York. He has contributed his time and energy to charitable and community organizations too numerous to recite. Most importantly, he has a deep understanding of all issues related to the Holocaust. He is a member of the Board of the Museum of Jewish Heritage-A Living Memorial to the Holocaust, which is located in New York. He is also the author of *The Timetables of Jewish History* (1993). In addition to working on the plan of allocation and distribution, he has been a wise counsel who has educated me about many of the critical issues relating to the formulation of a meaningful plan of allocation and distribution.

The appointment of a Special Master here also obviates the concern that hypothetical conflicts among class members relating to allocation and distribution would require separate representation, and thus call into question the adequacy of representation. This is so because the class members *represent themselves* on this key issue, and have direct access to the Special Master and to me. The adequacy concerns that informed the Supreme Court's decisions in *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 119 S.Ct. 2295, 144 L.Ed.2d 715 (1999), and *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997), are therefore absent from this case. The Special Master will file the proposed plan of allocation and distribution not later than 30 days from the date of the entry of the final judgment approving the settlement.

At the fairness hearings, however, several persons criticized the decision to hold any fairness hearing prior to receiving notice of the specific amounts they were likely to recover.

I agree that, ordinarily, it is preferable to provide specific information to class members concerning their likely recovery prior to the fairness hearing in order to permit criticism and challenge, if appropriate. However, the special circumstances of this litigation, involving five worldwide settlement classes arising out of events that transpired approximately 60 years ago, make it virtually impossible to provide specific information to individuals about their precise recovery prior to the completion of the elaborate claims processes contemplated by the Settlement Agreement, and under consideration by the Special Master. The implementation of such an elaborate and expensive set of claims processes would be impossible in the absence of a threshold judicial finding that the basic Settlement Agreement, including the gross settlement amount and the procedures for allocating and distributing specific amounts to class members, is fair, reasonable and adequate. Thus, it was physically impossible to provide class members with specific information concerning their individual recoveries at this stage of the proceedings.

To compensate for this inability, counsel provided elaborate notice of the procedures that were to be used to reach the point where specific amounts would be payable, and asked the class to pre-commit to those procedures in lieu of considering a specific amount at this stage of the proceedings. In particular, the unique circumstances of this complex litigation require *both* a fairness hearing on the terms of the basic settlement, and a subsequent opportunity to comment on the Special Master's recommended plan of allocation and distribution. Thus, the parties have contemplated that, once I have approved the basic fairness of the settlement and its ***151** attendant procedures, the Special Master will promptly issue his recommendations concerning allocation and distribution and those recommendations will be transmitted for comment and criticism to the members of the plaintiff classes. Only after I approve the plan of allocation and distribution will a claims process capable of generating specific figures be possible.

Significantly, as the Second Circuit has recognized,

> [t]he formulation of the [distribution] plan in a case such as this is a difficult, time-consuming process. To impose an absolute requirement that a hearing on the fairness of a settlement follow adoption of a distribution plan would immensely complicate settlement negotiations and might so overburden the parties and the district court as to prevent either task from being accomplished.

In re "Agent Orange" Product Liability Litigation, 818 F.2d 145, 170 (2d Cir.1987) (Winter, J.); *see also NASDAQ*, 187 F.R.D. at 480 ("it is appropriate, and often prudent, in massive class actions to follow a two-stage procedure, deferring the Plan of Allocation until after final settlement approval"); *MCL 3d* § 30.212 ("Often the details of allocation and distribution are not established until after the settlement is approved"). Moreover, all class members have been informed of this process, and either had the opportunity to participate in it as a fair, transparent and open process for the determination of allocation issues, or had the opportunity to object or exclude themselves. The class overwhelmingly has endorsed such an approach. Under these circumstances, I reject the objection to the bifurcated process contemplated by the Settlement Agreement.

B. *The Volcker Report*

These suits were filed two years after the World Jewish Restitution Organization had initiated discussions regarding certain restitution issues. Such negotiations led to, among other things, the creation of the Independent Committee of Eminent Persons (the "ICEP"). The ICEP, chaired by Paul A. Volcker (and also referred to hereafter as the "Volcker Committee"), was established in May 1996 by the Swiss Bankers Association, the World Jewish Congress and other Jewish organizations to conduct an audit of the settling defendants and other Swiss banks to identify accounts from the World War II era that could possibly belong to victims of Nazi persecution. The Volcker Committee conducted what is

likely the most extensive audit in history, employing five of the largest accounting firms in the world at a cost of hundreds of millions of dollars to defendants. At the conclusion of its investigation, the Volcker Committee prepared a formal 100-plus page report, which it released on December 6, 1999 (the "Volcker Report"), setting forth its findings in detail, which included the revelation that approximately 54,000 Swiss bank accounts appear to have a "probable" or "possible" connection to a Holocaust victim. On February 23, 2000, the Volcker Committee announced that a review of the approximately 54,000 accounts identified as "probably" or "possibly" related to victims of Nazi persecution resulted in the elimination of certain accounts because they were duplicates or because of other technical factors, reducing the total number of such accounts to between 45,000 and 50,000. *See* Volcker Committee Press Release (Feb. 23, 2000). The Volcker Committee also announced that it had identified additional accounts that should be included among those "probable" accounts recommended for publication, increasing the total number of publishable accounts from approximately 25,000 to more than 26,000. *Id.* Nevertheless, for the sake of convenience, I use the initial Volcker Committee numbers throughout.

The parties reached an informal agreement to settle this case for $1.25 billion in August 1998, with knowledge that the Volcker Committee's investigation was ongoing and not likely to be completed for ***152** some time. The parties felt that it was appropriate to proceed without waiting, not only because of the reasonableness of the settlement, but because an early agreement set in motion many of the procedural hurdles that had to be overcome in order for the settlement process to reach its current stage of final approval for fairness. These included the further negotiation and formalization of the informal settlement into the Settlement Agreement as originally executed; the preparation and dissemination of class notice; the conduct of the fairness hearings; and the

negotiation of amendments to the Settlement Agreement to address valid objections raised at the fairness hearings. If this entire process had been delayed pending the results of the Volcker Report, which was not released until December 1999, the plaintiff class members would now be almost two years further removed from receiving distributions under the Settlement Agreement.

Several persons, however, voiced concern at the fairness hearings that the adequacy of the $1.25 billion settlement should be re-evaluated in light of the Volcker Report's identification of the approximately 54,000 Swiss bank accounts that are "probably" or "possibly" connected to Holocaust victims. While understandable, these objections do not justify upsetting the settlement.

Prior to the issuance of the Volcker Report, plaintiffs' counsel had asserted that, if the case were to proceed to trial, and if they were granted adequate discovery, they would be in a position to demonstrate the existence of large numbers of bank accounts in Swiss banks with a connection to Holocaust survivors. In fact, in conducting the negotiations that culminated in the $1.25 billion Settlement Agreement, plaintiffs' negotiating team utilized figures derived from an economic analysis of the flow of funds into Switzerland during the relevant period that were extremely close to the figures that were eventually suggested by the Volcker Report. Declaration of Burt Neuborne (June 26, 2000) ("Neuborne Decl. II") ¶ 8. While the flow of funds figures were considerably higher than $1.25 billion, when discounted for the risks of litigation, the need for expeditious action and the necessarily imprecise nature of the economic analysis itself, the figures utilized by counsel in conducting the actual negotiations were roughly comparable to the figures derived from the Volcker Report. *Id.* Thus, the findings of the Volcker Report confirmed, rather than undermined, an important element of class counsel's expectations concerning plaintiffs' potential recovery in this

case, and which class counsel had in mind when agreeing upon the settlement amount.

Moreover, the Volcker Report's identification of approximately 54,000 accounts with a "probable" or "possible" relation to Holocaust victims would not necessarily have been sufficient to establish a particular account holder's claim in the event this case had proceeded to trial. In order to prevail on most types of civil claims in an American forum, a plaintiff must demonstrate, at the very least, an entitlement to relief by a preponderance of the evidence-*i.e.*, that it is more likely than not that he or she is entitled to recover. Specifically addressing the issue of the difference between the criteria it employed and those that would be applied in a judicial proceeding, the Volcker Committee observed that

> [t]he determination of the probability or possibility of a relationship [of an account] to victims of Nazi persecution has been guided by certain strong presumptions about account characteristics, including name matches [with Holocaust victims]. However, *the precision of proof of such relationships normally applicable in judicial proceedings will rather typically depend upon evidence that is rarely still available after more than half a century.*

Volcker Report ¶ 69 (emphasis added). Indeed, the Volcker Committee recommended that "any claims resolution process***153** must take this reality into account." *Id.*

The absence of evidence necessary to meet "the precision of proof ... normally applicable in judicial proceedings" is due to the destruction of records of the Swiss banks, and there may have been an arguable legal basis for drawing an adverse inference against the banks had the case been litigated. *See, e.g., Reilly v. Natwest Markets Group, Inc.*, 181 F.3d 253, 266-68 (2d Cir.1999); *Kronisch v. United States*, 150 F.3d 112, 126-28 (2d Cir.1998). Nevertheless, the practical and legal problems resulting from the destruction of evidence and the passage of time counsel against litigating these claims.

Indeed, a claims resolution process applying rules for recovery less rigorous than a legal proceeding could result in the payment of more claims than would otherwise be possible. *See* Declaration of Stuart E. Eizenstat (Nov. 23, 1999) ¶ 2 ("the number of victims who would be covered by some sort of negotiated settlement is often greater than can be achieved through litigation").

I note finally that the Volcker Committee came to the following conclusion with respect to the adequacy of the $1.25 billion settlement amount:

> [T]he investigation was not and could not be complete in the sense of reconstructing all accounts in Swiss banks in 1945. Had that been possible, additional victim accounts would be identified, and some victim accounts may have been missing among the 4.1 million identified accounts. In reviewing and balancing all these considerations, the Committee believes that claims of victims can be met within the amount specified in the [Settlement Agreement in this case], with funds from that settlement available for distribution to others covered by the settlement.

Volcker Report Annex 4 ¶ 43. Nevertheless, even if the claims resolution process reveals that the $1.25 billion settlement amount is insufficient to cover the aggregate value of these accounts, the potential shortfall must be weighed against the alternative. Even if plaintiffs were able to withstand dispositive motions and proceed through trial to a favorable judgment, the attendant appeals and other well-recognized delays of litigation could postpone indefinitely justice to the class members. Under these circumstances, a speedy settlement for a reasonable sum is far preferable to continued litigation, even in light of the revelations in the Volcker Report.

* * *

There is one final observation regarding the Volcker Report of which cognizance should be taken. In his initial dec-

laration in support of the motion to approve the Settlement Agreement, Professor Neuborne observed that,

> since certain persons may be tempted to mischaracterize legitimate settlement payments as a form of blackmail, a District Judge conducting a Rule 23(e) hearing should briefly assess the merits of plaintiffs' claims to assure that the Rule 23 process is not being abused, and to prevent public misperception that the judicial process is being improperly utilized as a tool of extortion.

Neuborne Decl. I ¶ 8. The significance of the report of the Volcker Committee, which included three members appointed by the Swiss Bankers Association, is that it provided legal and moral legitimacy to the claims asserted here on behalf of the members of the Deposited Assets Class. The findings suggest that the value of deposited assets held by the Swiss banks could exceed the $1.25 billion settlement amount. *See* Volcker Report Annex 4 ¶ ¶ 41-42 & n. 23.[2] Indeed, it is only the ***154** successful campaign that the Swiss banks waged to prevent disclosure before records were destroyed, Volcker Report ¶¶ 41(b), 48, that gave rise to the legal and practical impediments to the successful litigation of this case by the vast majority of individuals to whom money is justly due.

C. Administration of the Deposited Assets Class

The Deposited Assets Class consists of victims of Nazi persecution who have claims against any Releasee "relating to or arising in any way from Deposited Assets or any effort to

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[2] This portion of the Volcker Report estimated the present value of certain categories of accounts, in Swiss francs, which it derived from mean and median values of known accounts. In concluding that the total value of accounts appears to exceed $1.25 billion, I have converted the Volcker Committee's figures (derived from the mean value of known accounts) to U.S. dollars using the currency exchange rate in effect at the close of trading last week. While the total estimated value of accounts derived from the median value of known accounts, as opposed to the mean value, is less than $1.25 billion, both the mean and median figures may significantly understate the account values for reasons that need not be detailed here.

recover Deposited Assets." Settlement Agreement ¶ 8.2(a). A fair and efficient claims process in connection with the Deposited Assets Class must build on the fact that the Volcker Committee's auditors, despite the massive destruction of relevant records over the past 60 years, were able to identify the approximately 54,000 Swiss bank accounts discussed above. As Professor Neuborne observes, in order to continue the work of the Volcker Committee, it will be necessary to establish a deposited assets claims process designed to (i) notify potential claimants of the existence of the 54,000 accounts referred to in the Volcker Report; (ii) determine whether the original owners of such accounts are or were targets or victims of Nazi persecution, as defined in the Settlement Agreement; (iii) ascertain their heirs, if necessary; (iv) determine the amounts attributable to each account; (v) explore the circumstances surrounding the closing of certain of the accounts; and (vi) distribute the appropriate amounts to the current owners. Neuborne Decl. II ¶ 19. Moreover, aside from providing a mechanism to address claims related to the 54,000 "probable" or "possible" accounts, a fair claims process must provide a mechanism to enable any person with a potential claim to have names matched against the database of 4.1 million accounts for which records exist. Volcker Report ¶ 76.

The instrumentality for the administration of the claims process contemplated by the Settlement Agreement is the Claims Resolution Tribunal established by the Swiss Bankers Association, the Swiss Federal Banking Commission and the Volcker Committee to arbitrate claims arising from the 1997 publication of 5,570 foreign accounts in Swiss Banks. Modifications in procedures and personnel will be required and the Claims Resolution Tribunal will operate under guidelines and criteria established with my approval, in consultation with the Volcker Committee. *See* Settlement Agreement ¶ 4.1 ("[T]he parties anticipate that the ICEP and the Claims Resolution Tribunal will continue, at certain Releasees' expense, in

a manner that is appropriate in light of this Settlement Agreement").

The purpose of the Claims Resolution Tribunal is to administer a fair and efficient claims process. This process includes, among other things, assuring

> that any person with a valid claim to a dormant account of a victim of Nazi persecution, whether or not an account name is published, should be provided facilities for submitting such a claim. Claims already submitted to ICEP, new claims submitted to the [Claims Resolution] Tribunal directly, claims filed with the Class Action Settlement, and claims from the New York State Holocaust Claims Processing Office should be matched against the available databases of accounts. If there are matches of such claimants on these lists with the full list of names of account holders, a claims resolution process should be initiated by the Claims Resolution Tribunal. In principle, the [ICEP] believes that all victims of Nazi persecution or their heirs who submit a claim should be able ***155** to have such a claim resolved if the account holder's name is indeed found in the accounts database by the Claims Resolution Tribunal.

Volcker Report ¶ 76. So that the claims resolution process would function efficiently, the Volcker Committee recommended the publication of 25,187 of the 54,000 accounts, which are "probably" related to a Holocaust victim, *id.* ¶ 74; it recommended the process by which names could be matched to information in a centralized database, *id.* ¶ 76; and it recommended the creation of a central database of all 4.1 million accounts opened in Switzerland between 1933-45. *Id.* ¶ 67.

Some background is necessary to understand the significance of the latter recommendation. There were approximately 6,858,116 accounts that were opened in Swiss banks between 1933-45. Of these, no records existed for approximately 2,757,950 accounts, "an unfillable gap ... that can now

never be known or analyzed for their relationship to victims of Nazi persecution." Volcker Report Annex 4 ¶ 5. Of the remaining approximately 4.1 million accounts, the Volcker Committee used its key methodology of matching the names of account holders against the names of victims of Nazi persecution to only approximately 2.25 million accounts. The matching process was not applied to 1,065,630 domestic Swiss accounts and 784,791 small savings accounts. Volcker Report Annex 4 at 59-60. The bottom line of this is that the 54,000 matched accounts that were identified as "probably" or "possibly" belonging to victims of Nazi persecution is based on an audit of approximately one-third of the accounts opened in Switzerland during the relevant period. Consequently, as the Volcker Committee observed, "the total of the number and value of accounts with some presumption of involvement with victims of Nazi persecution identified by the investigation is clearly conservative." Volcker Report ¶ 58.

More specifically, Chairman Volcker has stated that "there will be some limited but significant number of Holocaust related accounts to be found among the millions of savings and Swiss address accounts that we arbitrarily excluded from our research." Letter of Chairman Volcker to Swiss Federal Banking Commission Chairman K. Hauri (Apr. 12, 2000) at 2. This is in part because many victims of Nazi terror may have opened Swiss bank accounts using a secondary residence address in Switzerland, or a false Swiss address designed to confuse the Nazis, or the Swiss address of a friend, business associate or lawyer. Chairman Volcker made this point in explaining language in the Volcker Report, *see* Volcker Report Annex 4 ¶ 8, which suggested that domestic Swiss accounts and small savings accounts were not relevant to its investigation:

> These convenient shorthand descriptions [(*i.e.*, "relevant" or "irrelevant" accounts and "probable" or "possible" relationships to Holocaust victims)], perhaps too cryptic in light of lawyers determination to split hairs,

> cannot contradict the uncontestable fact that the exclusion of millions of small savings accounts and Swiss address accounts from the ICEP analysis in the interest of speedy and manageable results does not, and cannot, mean that none of those accounts were Holocaust related. To the extent that such accounts can be practically and expeditiously identified, which is what the test experiment suggests is entirely feasible, the effort should be done to put this matter to rest.

Volcker Letter at 3. This, he explained, was the reason for the need to create a central database of 4.1 million accounts, including the Swiss address and small bank accounts.

On March 30, 2000, after an inordinately long and unexplained delay of four months following the publication of the Volcker Report, the Swiss Federal Banking Commission ("SFBC") authorized publication of relevant information relating to approximately 26,000 of the accounts referred to in the Volcker Report that were identified ***156** as having a "probable" link to Holocaust victims. Neuborne Decl. II ¶ 21 & Ex. 7. No authorization was given by the SFBC for the publication of information relating to the approximately 28,000 remaining accounts identified in the Volcker Report as "possibly" related to Holocaust victims. Moreover, unlike earlier SFBC rulings concerning publication of information relevant to Holocaust-related accounts, the SFBC merely "authorized" publication of much of the relevant information, but did not mandate complete publication. Perhaps even more disturbing was the failure of the SFBC to mandate the creation of a central database of 4.1 million accounts that were opened in Switzerland between 1933-45. In sum, the SFBC, by its actions, has made it much more difficult to carry out the mandate of the Volcker Committee that "victims who have been long denied justice by circumstances beyond their control-often poor and now aged-deserve every reasonable assistance in establishing a claim." Volcker Report ¶ 70.

The failure of the SFBC to implement fully the recommendations of the Volcker Committee raised serious questions over whether it would be possible to administer a fair claims process in connection with the Deposited Assets Class. This is because access would be denied to information necessary (i) to provide notice to all potential claimants of the existence of bank accounts with a "probable" or "possible" connection to Holocaust victims, (ii) to permit victims of Nazi persecution to have names matched against the database of 4.1 million accounts for which records exist and (iii) to permit a deposited assets claims resolution process to operate fairly, efficiently and in accordance with procedural due process of law.

Professor Neuborne advises me that the defendant banks, acting pursuant to the SFBC's authorization, have agreed to cooperate in assembling information concerning their portion of the 26,000 "probable" accounts referred to in the SFBC's March 30 order in order to permit expeditious publication of names and other identifying information associated with those accounts after approval of a final plan of allocation and distribution. Neuborne Decl. II ¶ 22. The defendant banks also have agreed to cooperate in achieving an earlier publication date if approval of the allocation and distribution plan encounters substantial delays, if it is possible to assemble the information needed for publication prior to such approval and if an adequate court-approved claims process is in place to assist claimants. *Id.*

I am also informed that the defendant banks, acting pursuant to SFBC authorization, have agreed to create a centralized electronic database relating to their share of the 54,000 accounts referred to in the Volcker Report. Neuborne Decl. II ¶ 26. They have also agreed to permit the personnel of the Claims Resolution Tribunal established under the Settlement Agreement to have convenient access to the centralized database of the 54,000 accounts and to the Volcker Committee's auditors' paper files in connection with such accounts. *Id.*

The defendant banks' cooperation also will be geared towards assisting in the matching of claims to accounts that claims personnel have a reasoned and satisfactory basis for concluding may be listed under a Swiss address (including accounts opened in the names of intermediaries) against existing bank databases containing 2.1 million accounts opened during the relevant period. *Id.* ¶ 27. These databases include the Swiss address accounts opened in those banks. In addition, the defendant banks have represented that "they will consider in a spirit of cooperation requests for further assistance in any particular cases where there is a reasonably strong likelihood that further assistance would provide probative information and where the costs of such further assistance do not outweigh the potential benefits." Memorandum to File of Burt Neuborne, Esq. ***157** and Roger Witten, Esq. (undated) ¶ B(3).[3]

Nevertheless, the failure of the SFBC to mandate compliance with the recommendations of the Volcker Committee, coupled with the unwillingness of the private or cantonal banks that are non-party releasees to voluntarily cooperate in permitting publication of information relating to some or all of their accounts that may be included within the 54,000 accounts referred to in the Volcker Report, have created substantial impediments to administration. The refusal of the cantonal and private banks to permit such publication is estimated to affect between 200-250 of the 26,000 accounts that are "probably" related to Holocaust victims and the names of which were authorized for publication by the SFBC. Neuborne Decl. II ¶ 23. This will make it impossible to notify class members of the existence of these accounts. The failure of the cantonal and private banks to cooperate also will seriously impede the ability of the claims process to carry out the Settlement Agreement with respect to as many as 3,500 of the 20,000 remaining accounts in these non-party banks that the Volcker Report identified as being "possibly" related to

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[3] This memorandum to file will be docketed with the Clerk of the Court.

Holocaust victims." *Id.* ¶ 28. Nor will the private and cantonal banks permit voluntary access to their records to match possible Swiss address accounts. *Id.*

The unwillingness of the SFBC to mandate compliance with the recommendations of the Volcker Committee is inexplicable, and the failure of the private and cantonal banks to voluntarily comply is inconsistent with the spirit of the Settlement Agreement, which recites that "Settling Plaintiffs and Settling Defendants commit to support and urge the conclusion of the mandates of the Volcker Committee." It also amounts to nothing less than a replay of the conduct that created the problems addressed in this case. I refer here in particular to the unanimous findings of the Volcker Committee, which included three members appointed by the Swiss Bankers Association. While its auditors "reported no evidence of systematic destruction of records of victim accounts, organized discrimination against the accounts of victims of Nazi persecution, or concerted efforts to divert the funds of victims of Nazi persecution to improper purposes," Volcker Report ¶ 41(a) (internal footnote omitted), the Volcker Committee nonetheless

> confirmed evidence of questionable and deceitful actions by some individual banks in the handling of accounts of victims, including withholding of information from Holocaust victims or their heirs about their accounts, inappropriate closing of accounts, failure to keep adequate records, many cases of insensitivity to the efforts of victims or heirs of victims to claim dormant or closed accounts, and a general lack of diligence-even active resistance-in response to earlier private and official inquiries about dormant accounts.

Id. ¶ 41(b) (internal footnote omitted). More significantly, the Volcker Committee unanimously found that

> [t]he Swiss commitment to bank secrecy and a concern about maintaining the integrity of that secrecy-ironically in part a response to foreign exchange controls in Ger-

> many and their use to persecute Jews there-were undoubtedly factors in the decision not to publish the names of the dormant account holders after World War II. Switzerland had an informed and vigorous debate extending over a number of years on this subject. Banks were also concerned that too liberal a regime for processing claims to dormant accounts would result in payments to the wrong parties and double liability for the banks. *Unfortunately, the banks and their Association lobbied against legislation that would have required publication of the names of such so called "heirless assets accounts," legislation that if enacted and implemented, would have obviated the ICEP investigation*158 and the controversy of the last 30 years. An historic opportunity was missed.*

Id. ¶ 48 (emphasis added).

It is disturbing, to say the least, that, having participated in creating the problem that the Volcker Committee was attempting to address, the Swiss private and cantonal banks do not feel a moral obligation to the victims of Nazi persecution. Nevertheless, if they seek the benefit of releases under the Settlement Agreement, these banks cannot legally continue to conceal from the class information needed to take advantage of the benefits conferred by the Settlement Agreement. Requiring this minimal cooperation as a condition for a release does not deny any benefit that the Settlement Agreement confers. To the contrary, it grants the benefit of the Settlement Agreement subject to the releasees' compliance with the duty to act in good faith. *See Restatement (Second) of Contracts* § 205 (1981) ("Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement"); *see also Carvel Corp. v. Diversified Management Group, Inc.*, 930 F.2d 228, 230 (2d Cir.1991) ("Under New York law, every contract contains an implied covenant of good faith and fair dealing").

This duty of good faith reflects the principle that one who seeks equitable relief, such as the specific performance of a contract, must behave equitably. *See, e.g., Overall v. Estate of L.H.P. Klotz,* 52 F.3d 398, 404 (2d Cir.1995) ("a person who seeks equity must do equity"). "[T]his vague single principle gets most of its qualities in a given group of cases from the substantive law of the particular subject. It is largely shaped by the human practices and public policies involved in the situation." Zechariah Chafee, Jr., *Coming Into Equity With Clean Hands,* 47 Mich. L.Rev. 877, 1092 (1949). The most apt statement of the applicable substantive law may be found in *Price v. Spielman Motor Sales Co.,* 261 A.D. 626, 629, 26 N.Y.S.2d 836, 839 (2d Dep't 1941):

> Though a court balks at making a contract for the parties, it will, where justice and expediency demand, infuse the contract with a spirit of good faith and fair dealing in order to justify the implication of a covenant which will prevent one party from impairing the right of the other party to receive the fruits of the contract.

(Internal quotation marks omitted.) Applied here, this means that a party who seeks to enforce a contract for a release extinguishing the claims of a particular class cannot in good faith withhold from class members the information necessary in order to claim benefits to which they are entitled.

In sum, my hope is that the Swiss Confederation, if not the SFBC, will take the steps necessary to compel the cantonal and private banks to comply with the Volcker Committee's recommendations to the same extent as the defendant banks have agreed to comply. Nevertheless, their failure to do so does not justify disapproving the settlement with the defendant banks. They have pledged "their good faith cooperation with the implementation of the settlement." Memorandum to File of Burt Neuborne, Esq. and Roger Witten, Esq. (undated) ¶ A. This is a pledge that reflects their legal obligation. It is one to which I intend to hold them.

D. *Looted Art*

At the fairness hearings, several objectors, most notably Anne Webber, speaking on behalf of the Commission for Looted Art in Europe, observed that the broad scope of the releases initially contemplated in connection with the Looted Assets Class might pose an obstacle to the recovery of artworks and other items of specific property looted by the Nazis and currently in the possession of a Swiss releasee. A careful reading of the Settlement Agreement alone should allay a part of these concerns. Specifically, under the Settlement*159 Agreement, the definition of "Releasees" includes governmental entities and business concerns; the definition does not cover private foundations, private museums or individual collectors. Settlement Agreement ¶ 1. This means that the Settlement Agreement does not impose any obstacle to the recovery of looted art from a significant group of potential collectors.

While the Settlement Agreement does preclude the recovery of looted art from Swiss businesses and governmental agencies, the legal and practical obstacles to the recovery of art from this group are already substantial, if not insurmountable. Unlike New York law, for example, Swiss law permits a purchaser in good faith to acquire valid title to stolen art. Swiss law also presumes that a purchaser acts in good faith, and a plaintiff seeking to reclaim stolen property has the burden of establishing that a purchaser did not act in good faith. *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc.*, 717 F.Supp. 1374, 1400 (S.D.Ind.1989), *aff'd*, 917 F.2d 278 (7th Cir.1990). Indeed, Switzerland has been described as "a country to which buyers of stolen art flock in order to claim Swiss law's protection of buyers." Steven A. Bibas, *The Case Against Statutes of Limitations for Stolen Art*, 103 Yale L.J. 2437, 2449 (1994) (citing Stanley Meisler, *Art & Avarice*, L.A. Times, Nov. 12, 1989, Magazine, at 8, 10-11 (describing the facts that gave rise to the *Autocephalous* case)).

Under these circumstances, the releases granted under the Settlement Agreement added little to the protection already enjoyed by the releasees under Swiss law. In any event, the defendant banks have agreed to modify the original Settlement Agreement to assure that persons may seek judicial assistance in recovering looted artwork, rare books and other items of cultural provenance from releasees without any serious impediment created by the Settlement Agreement. Accordingly, while the amended releases contemplated by the amended Settlement Agreement would continue to bar damages actions, they would not bar actions in the nature of replevin designed to recover specific items of artwork, as long as the actions are brought in the country where the artwork is located, or from which it was looted.

Two specific aspects of the amended Settlement Agreement have drawn further criticism, however. First, critics appear troubled by provisions limiting litigation designed to recover specific works of art to the country where the art is located, or from where it was seized. The amended art releases would, however, permit litigation to recover art that is temporarily in the United States or on loan, or for exhibition. Since efforts in the United States to litigate concerning art that is physically located in another country might well be subject to transfer to that country under the doctrine of *forum non conveniens,* and would not likely be governed by our law even if not transferred, I reject the objection to the venue provisions concerning art in the amended agreement.

Second, critics have expressed concern over a requirement that individuals take "reasonable steps" to secure the return of artwork before commencing litigation. This is not an unusual requirement. Under New York law, for example, "[u]ntil demand and refusal, the purchaser in good faith is not considered a wrongdoer." *DeWeerth v. Baldinger,* 836 F.2d 103, 106 (2d Cir.1987). I do not understand the term "reasonable steps" to require any more than this.

Nevertheless, I agree with the objectors that the proposed amendments may be more symbolic than significant. The problem, however, is not the Settlement Agreement, but Swiss law, which likely would apply in any event, and the practical problems associated with locating looted art. *See* Letter of Anne Webber (Dec. 7, 1999) at 3 ("We cannot stress enough how very difficult it has been for claimants over the last 55 years just to locate their looted property, so artful has been the concealing of it by those in possession of it"). Under ***160** these circumstances, it would simply be irresponsible to reject the Settlement Agreement because of the objections relating to looted art.

E. *Insurance Releases*

The original Settlement Agreement provides for releases to a number of unidentified non-party Swiss insurance companies, defined broadly to include any insurance company where at least 25 percent of the outstanding stock is owned by a Swiss company. Several Swiss insurance companies against which litigation was pending in the federal courts were explicitly excluded from these releases.

In connection with the fairness hearings, I received several well-taken objections to the inclusion of insurers as "Releasees" under the Settlement Agreement. The objections related to the effectiveness of notice as to claims against released Swiss insurers and the appropriateness of releasing such insurers in the absence of a mechanism to pay valid Holocaust-related insurance claims as part of the distribution of the settlement fund.

In response to these objections, the parties and major Swiss insurers released under the Settlement Agreement, after extensive discussions, have agreed on a mechanism to evaluate and pay Holocaust-related insurance claims. The mechanism, set forth in Article 4 of Amendment 2 to the Settlement Agreement, specifically designates up to $100 million (including up to an additional $50 million provided by the insurers themselves) for the resolution of unpaid insurance claims.

The mechanism provides for prompt and fair consideration of all insurance claims, appropriate multipliers for such claims, full cooperation of the participating insurers in providing relevant documentary material to potential claimants (subject to monitoring by the Swiss insurance supervisor) and assurance of payment from the settling defendants. The amendment also contains a provision that acknowledges my power to order participating insurers to disclose the holders of policies, with the consequence of an insurer's failure to comply being the exclusion of such insurer from all provisions of the Settlement Agreement. My power to order such disclosure is subject to the application of certain standards that are not inconsistent with the good faith duty of a releasee to make disclosures necessary to permit class beneficiaries to obtain the benefits of the Settlement Agreement. *See supra* at 158-59. The details of the insurance claims mechanism and the list of participating released insurers will be part of the notice of the proposed plan of allocation and distribution, and class members will have an opportunity to opt out of the insurance provisions of Amendment 2.

I find that the insurance provisions of Amendment 2 are fair and reasonable, and adequately address the concerns raised in the objections submitted in connection with the fairness hearings. Accordingly, they merit approval as part of the settlement. In reaching this decision, I have considered all of the relevant factors and circumstances, including the status of insurers as releasees under the Settlement Agreement, the addition of up to $50 million to the settlement amount and the unavailability of a superior mechanism for the payment of Holocaust-related claims involving such insurers. I have also relied upon the following representations by the participating insurance carriers: (i) the amount of unpaid "Policy Claims" under Amendment 2 is not likely to exceed $100 million in the aggregate (including multipliers) and (ii) most of the participating insurance carriers have reasonably complete surviving documentation that will permit them (and

the settlement's insurance claims mechanism contemplated by Amendment 2) to provide fair and efficient consideration of all claims.

F. *Administration of the Refugee Class*

The Refugee Class consists of victims of Nazi persecution "who sought entry into ***161** Switzerland in whole or in part to avoid Nazi persecution and who ... were denied entry into Switzerland or, after gaining entry, were deported, detained, abused, or otherwise mistreated." Settlement Agreement ¶ 8.2(c). The Special Master has expressed concerns over the ability to administer the Refugee Class in a fair and efficient manner in the absence of information concerning the identities of persons expelled from, or denied entry into, Switzerland during the relevant period. In the absence of such information, it will be extremely difficult to notify potential Refugee Class claimants of their rights, and to fairly administer a refugee claims process.

In December 1999, the Independent Commission of Experts-an independent group of internationally recognized historians chaired by Jean Francois Bergier that was established by the Swiss Confederation in 1996 to examine Switzerland's relationship with Nazi Germany (and referred to hereafter as the "Bergier Commission")-released a report (the "Bergier Report") indicating that approximately 14,500 applications to gain entry into Switzerland were rejected by the Federal Foreign Police and that more than 24,000 refugees were turned back at the border or expelled during the war years. Bergier Report at 129; Letter of Prof. Dr. Christoph Graf to Judah Gribetz, Esq. (Mar. 31, 2000) at 2. On March 31, 2000, the Swiss Federal Council authorized the Swiss Federal Archives ("SFA") to release to the Special Master a list of persons denied entry into, or expelled from, Switzerland during the relevant period. Neuborne Decl. II ¶ 38. I acknowledge the good faith cooperation of the SFA in compiling this list. Unfortunately, however, SFA officials have informed the Special Master that it "will be possible to collect a small part of the

names only," and that, "[a]t the moment, this list contains about 2,500" names. Memorandum of Judah Gribetz, Esq. (June 29, 2000) at 2. This is woefully inadequate. Nevertheless, the SFA further informed the Special Master that it "is trying to establish a list of names of refugees ... with the help of the cantonal archives," and that, of the cantons, only Geneva is likely to have a "substantially complete set of data concerning refugees turned back at the border." *Id.* To that end, the SFA has contacted the Geneva archives for assistance in compiling this information. *Id.*

If it proves impossible to assemble the information needed because Swiss entities (including cantonal entities) refuse to provide information that they have in their possession that is needed for the fair administration of the Refugee Class, I will consider an application for modification of the enforceability of releases with respect to those entities.

G. *Administration of Slave Labor Class I*

Slave Labor Class I consists of victims of Nazi persecution who performed slave labor "for companies or entities that actually or allegedly deposited the revenues or proceeds of that labor with, or transacted such revenues or proceeds through, Releasees." Settlement Agreement ¶ 8.2(c). The Special Master has expressed concern over the ability to administer Slave Labor Class I in the absence of information identifying those German companies within the purview of this class definition. The information is necessary to determine whether a presumption is warranted in connection with the administration of Slave Labor Class I that virtually all German companies that employed slave labor also "deposited" or "transacted" the revenues or proceeds of this labor in Switzerland. Such a presumption would simplify the administration of Slave Labor Class I by making it unnecessary for each claimant to prove a link between the German company for which slave labor was performed and a Swiss bank. I am informed that the SFA appears to have made available the necessary information. Neuborne Decl. II ¶ 39.

H. *Administration of Slave Labor Class II*

Slave Labor Class II consists of individuals who performed slave labor "at any ***162** facility or work site, wherever located, actually or allegedly owned, controlled, or operated by any corporation or other business concern headquartered, organized, or based in Switzerland or any affiliate thereof." Settlement Agreement ¶ 8.2(d). The membership of Slave Labor Class II, unlike the other classes, is not limited to victims of Nazi persecution who were Jewish, Romani, Jehovah's Witnesses, homosexual, or physically or mentally disabled. The Special Master has expressed concern over the ability to administer Slave Labor Class II in the absence of information concerning the identities of persons who performed slave labor for a Swiss company or its affiliates during World War II. When this class was included in the Settlement Agreement, the defendant banks represented that Slave Labor Class II consists of an extremely small number of persons who may have performed slave labor directly for an extremely small number of Swiss companies during World War II. Since then, they have backed off of this representation. In a letter to me dated July 11, 2000, counsel for the defendant banks stated the following:

> Please note that our assertions about the number of Swiss companies that used slave labor is based on our best estimate of historical facts. The banks have never, and do not now, represent that we have specific knowledge regarding the extent to which Swiss companies used slave labor. No systematic or scientific investigation has been done on this issue.... [T]he Bergier Commission's [forthcoming] report will presumably shed some light on this aspect of Switzerland's history.

Letter of Roger Witten, Esq. (July 11, 2000) at 3.

In the absence of information concerning the identities of the Slave Labor Class II members, it will prove extremely difficult to notify claimants that they may have a right to recover from the settlement fund. Indeed, because the Slave

Labor Class II releasees consist almost entirely of affiliates or subsidiaries of Swiss entities that were incorporated in Germany and elsewhere, members of the class-*e.g.*, those who were forced to perform slave labor for a Swiss company in Germany or elsewhere, but who had no reason to know at the time that the company was Swiss-may not be aware that they are in the class even if they have notice of the settlement. Moreover, without information as to the numbers of slave laborers, it will not be possible for the Special Master to make an intelligent allocation of the proceeds of the settlement fund.

Research by the SFA has failed to develop information concerning the identities of potential Slave Labor Class II claimants. Nor has the Special Master been able to develop significant information as to the identities of Swiss companies or their affiliates that may have utilized slave labor during the relevant period. I am informed that the SFA appears to be cooperating in assembling certain information as to Swiss companies that may have utilized slave labor. Neuborne Decl. II ¶ 40. Nevertheless, that information is incomplete, *see* SFA, *Forced Labor in Swiss Controlled Firms in NS Germany; Records in the Swiss Federal Archives; Preliminary Overview* (Apr. 10, 2000), and there is little prospect that a complete list can be obtained in sufficient time to make the necessary use of it. Indeed, the SFA has advised the Special Master that it could not identify "tangible information reflecting the situation of forced labor workers in German branches of Swiss firms [,] ... [although] indirect and scattered evidence could be found with time consuming research." *Id.* at 2.

Under these circumstances, those Swiss entities that seek releases from Slave Labor Class II are directed to identify themselves to the Special Master within 30 days of the date of this memorandum and order. The failure of Swiss entities seeking releases from Slave Labor Class II claims to identify themselves will result in the denial of a release and permit

those who have ***163** claims against those entities to pursue such claims independently of this lawsuit. Those three Swiss companies with respect to which the SFA already has provided information are now entitled to the benefits of releases for the utilization of approximately 2,500 slave laborers, subject to compliance with their good faith duty to provide information in their possession regarding the names of these slave laborers. *See supra* at 158-59.

I do not regard this order as effecting a material alteration of the terms of the Settlement Agreement. Indeed, without the ability to notify class members of the names of entities who employed slave laborers, releases against those entities would be worthless in any event. I repeat here what I said earlier: requiring this minimal cooperation as a condition for a release does not deny any benefit that the Settlement Agreement confers. Simply stated, this means that a party who seeks to enforce a contract for a release extinguishing the claims of a particular class cannot in good faith withhold its identity from class members who need that information in order to claim benefits to which they are entitled. Nor can it ignore reasonable orders pursuant to Fed.R.Civ.P. 23(d) to provide such information.

I. *The Defendant Banks' Threat to Repudiate the Amendments to the Settlement Agreement*

Prior to issuing this opinion, I provided the defendant banks with a draft of the foregoing discussion of the problems associated with Slave Labor Class II. The defendant banks have advised me that, if I required business entities that utilized slave labor to identify themselves as a condition to obtaining releases, they would repudiate the amendments to the Settlement Agreement that have been negotiated tediously over the last few months with my informal approval. These amendments, which have nothing to do with the issues relating to Slave Labor Class II, have not yet been executed in writing.

The reason for the defendant banks' unhappiness with the conditions placed upon the Slave Labor Class II releases is that "[o]ne of the fundamental premises for our 'all Switzerland' settlement was that, in exchange for a payment of $1.25 billion, all Swiss companies would be released from slave labor claims." Letter of Roger Witten, Esq. (July 11, 2000) at 1. Moreover, they claim that

> [i]t is not practical for the defendant banks to make public requests to all Swiss companies to investigate whether any of their subsidiaries used slave labor during World War II in order to respond to such a condition, nor would this be in harmony with the spirit or the terms of the settlement agreement.

Id.

I note at the outset that the $1.25 billion payment that defendants Union Bank of Switzerland and Credit Suisse made in exchange for releases for "all Switzerland" is money that could reasonably be said to have belonged to depositors who were victims of the Holocaust. Indeed, as I have already noted, the Volcker Committee's estimates indicate that the total value of these accounts could exceed $1.25 billion. *See supra* at 153-54 & footnote 2. The only reason for settling the case for less was the practical problem created by the wholesale destruction of records and, to a degree, the passage of time. Indeed, there was once a time when the Swiss promised that, if account holders could not be identified, this money would be paid to a charitable foundation for Holocaust survivors. As counsel for the defendant banks represented when arguing in support of his pretrial motion to dismiss,

> [t]he banks have committed, and I reiterate the commitment here; we will pay out any dormant account[4] dating from ***164** that era, any and all dormant accounts, if

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[4] Moments later, counsel conceded that he was referring to all "deposited assets," of which "dormant accounts" are simply a subset. Transcript of Oral Argument (July 31, 1997) at 36-37.

> it's linked to a specific claimant or if it's not linked. If there's any reason to believe that any account could have come from a dormant account, a Holocaust victim, the banks will disgorge or pay out that money. If it can't be linked, it will be paid out to appropriate, international, charitable organizations, in consultation with relevant Jewish and other Holocaust organizations.
>
> As I said, this process arises from directives of the [SFBC], and as such represents executive actions of the Swiss government, to which this Court, under the precedents, owes some deference, in my view a great deal of deference.

Transcript of Oral Argument (July 31, 1997) at 33-34; *see also* Defs.' Mem. in Support of Motion to Dismiss on *Forum Non Conveniens* Grounds (May 15, 1997) at 27-28.

In any event, I do not propose to deny releases to which Swiss companies who utilized slave laborers are entitled. I am simply requiring them to identify themselves and provide information (if they possess it) that is critical to the fair and efficient administration of Slave Labor Class II. Indeed, the proposed modification of the Settlement Agreement, as it relates to Swiss insurance companies who seek releases, contemplates notice to the class identifying each of the insurers who are to be released so that class beneficiaries will have available critical information necessary to file a claim. The same good faith is all that is required of the Slave Labor Class II releasees.

The suggestion that it is "not practical for the defendant banks to make public requests to all Swiss companies to investigate whether any of their subsidiaries used slave labor" is simply conclusory. I note, to begin with, that the request for this information is not new; it has been made repeatedly by the Special Master since his appointment. Nevertheless, cooperation by the SFA was forthcoming only recently. Moreover, although he did not say when, counsel for the defendant banks acknowledged that the Bergier Commission will pub-

lish a report concerning the utilization of slave laborers by the Swiss "that will be a significant additional informational resource." Letter of Roger Witten, Esq. (July 11, 2000) at 2. Under these circumstances, it seems reasonable to conclude that the small number of Swiss companies who the defendant banks suggested utilized slave laborers have good reason to know who they are. Nor is it my intention that any company be certain that it or its affiliates employed slave labor. The fact that they believe that it was likely or probable will suffice.

In sum, all I ask is good faith. Instead, defendants Union Bank of Switzerland and Credit Suisse threaten to disavow unrelated amendments intended to facilitate the approval of the Settlement Agreement and a fair and equitable distribution process. If they repudiate the modifications, I will approve the Settlement Agreement that was agreed upon initially. I add these words by way of explanation.

The most significant modification to the Settlement Agreement is the provision by which defendants Union Bank of Switzerland and Credit Suisse agree, subject to various conditions, to comply with the recommendations of the Volcker Committee-the cost of which would come out of the settlement proceeds. The repudiation of this particular modification would be a breach of the contractual implied duty of good faith to which they are already obligated and which I have the power to enforce.

The other significant parts of the modifications to the Settlement Agreement involve the *de facto* creation of a sixth class of beneficiaries who would be entitled to file claims against the participating insurance carriers by virtue of (i) those carriers' infusion of an additional $50 million in cash to the settlement fund and (ii) the agreed ***165** upon allocation of $50 million of the existing settlement fund to pay such insurance claims. Because this particular modification addresses defects that affect the validity of the releases under the Settlement Agreement, there is good reason to believe that

participating insurance carriers will reaffirm this aspect of the renegotiated agreement. Nevertheless, if the carriers do not reaffirm, I will issue a supplemental decision on the enforceability of the original insurance releases.

The last significant modification involves a compromise of a dispute over whether the defendant banks or the settlement fund will bear the costs associated with the administration of the claims resolution process. This dispute was resolved by a modification to the Settlement Agreement that "provide[s] for the acceleration of certain payments, and the modification of the flow of funds between the escrow fund and the settlement fund in order to generate additional interest payments payable to the settlement fund." Neuborne Decl. II ¶ 29. The accelerated payment schedule should generate between $23-27 million in additional interest. *Id.* This sum may substantially cover the costs of the continued functioning of the Claims Resolution Tribunal.

If the compromise is repudiated, paragraph 4.1 of the Settlement Agreement, which reads as follows, would apply:

> Although the parties anticipate that the ICEP and the Claims Resolution Tribunal will continue, *at certain Releasees' expense,* in a manner that is appropriate in light of this Settlement Agreement, Releasees shall have no additional financial exposure or additional liability of any kind whatsoever beyond the Settlement Amount on account of the activities or findings of the ICEP ... or the Claims Resolution Tribunal, or on account of any cessation of or change in the activities of the ICEP ... or the Claims Resolution Tribunal, *excluding costs associated with the functioning of those entities.*

(Emphases added.) While the defendant banks argue that the plain language of paragraph 4.1 requiring them to bear the costs associated with the functioning of the Claims Resolution Tribunal is not what the parties intended, that argument would seem to run afoul of the New York rule thata court may not, under the guise of interpretation, make a new contract for the

parties or change the words of a written contract so as to make it express the real intention of the parties if to do so would contradict the clearly expressed language of the contract....

> [W]e concern ourselves with what the parties intended, but only to the extent that they evidenced what they intended by what they wrote.

Rodolitz v. Neptune Paper Products, Inc., 22 N.Y.2d 383, 386-87, 292 N.Y.S.2d 878, 881, 239 N.E.2d 628 (1968) (internal quotation marks omitted); *see also* Settlement Agreement ¶ 16.2 (merger clause).

The least significant aspect of the modifications related to the looted art. I have already noted that the initial agreement did not provide any releases to individual collectors, private foundations and private museums. While it did release claims against Swiss business entities, the modification makes changes with respect to these entities that may be more symbolic than significant.

In sum, it is my hope that, upon reflection, defendants Union Bank of Switzerland and Credit Suisse will exercise the good judgment and good faith that they exhibited when they agreed to settle the case. If they do not do so, and instead repudiate the modifications to the Settlement Agreement, then I approve the Settlement Agreement that was agreed upon initially. The differences between the initial agreement and the modified one are not sufficient at this point to upset the finding that the settlement is fair, reasonable and adequate. Indeed, the principal reason for tolerating extended negotiation on the modifications was my belief that a ***166** fair and efficient claims distribution mechanism can best be accomplished by accommodation rather than conflict. The defendant banks now force me to choose between reasonable accommodation and my duty to protect the class beneficiaries. I choose the latter.

J. Other Objections Concerning Notice

In addition to the objections discussed at length above, a handful of other objectors challenged portions of the overall notice plan, governing the form, content and dissemination of notice to class members. I have considered those objections and determined that those objections are without merit.[5] For example, an advocate for the Roma incorrectly criticized the notices for not being translated into certain languages spoken by Roma and Sinti. However, the notice was in fact translated into languages spoken by Roma and Sinti.

The notice provided in this case was detailed, and contained far more than the amount of information necessary to satisfy Fed.R.Civ.P. 23 and due process. Moreover, the forms of notice were accurate, objective and understandable, and followed the guidelines and forms contained in *MCL 3d,* §§ 30.211, 30.212, and § 41.4 (sample class action orders). Persons with questions about any aspect of the settlement were able to access community resources, globally, including by speaking to persons who were trained by the notice administrators and settlement class counsel on settlement issues, such as the nature and scope of the release. Community outreach programs were aggressively implemented. In addition to the worldwide community outreach program described in the notice plan, a supplemental community outreach program was implemented in the United States, Canada, Israel and Australia to make additional volunteer and other resources

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[5] Disability Rights Advocates ("DRA"), a non-profit entity appearing on behalf of, although not formally representing, those members of the plaintiff classes with physical and mental disabilities (and their heirs), initially voiced an objection to the notice plan because it did not specifically target organizations benefitting persons with disabilities. Subsequently, DRA withdrew its objection. *See* Letters of Sid Wolinsky, Esq. (July 5 and July 31, 2000). DRA's objection does not have any merit. Nevertheless, it is unnecessary to address the objection in detail here in light of its unconditional withdrawal.

available to class members who had questions regarding the proposed settlement, or regarding the Initial Questionnaire.

K. *Attorneys' Fees*

Objections regarding attorneys' fees are premature. Although fee applications have been filed (and do not appear to exceed one percent of the total recovery *if* the applications are granted in their entirety), I have not yet made any decision regarding those applications. Instead, I have entered an order deferring a hearing on attorneys' fees until the date set for the hearing on the proposed plan of allocution and distribution of the settlement proceeds. Pursuant to that order, objections and comments to the application for attorneys' fees will be due two weeks before the hearing. There will also be full disclosure of all supporting time records.

* * *

I have considered all other comments and objections that have been made, and find that the Settlement Agreement is fair, reasonable and adequate and warrants final approval.

IV. *Maintenance of Certification of Settlement Classes*

I have already made numerous findings in support of certification of the five settlement classes defined above. No actual, non-speculative conflicts among class members exist. The settlement itself does not purport to allocate the fund to specific classes, subclasses, or claimants. Since the initial certification of the settlement classes, no facts have changed, and no case ***167** law has developed, that call into question the initial certification order. *Ortiz,* 527 U.S. 815, 119 S.Ct. 2295, 144 L.Ed.2d 715, decided after I entered the preliminary approval and certification order, does not call into question the propriety of the certification of these settlement classes.

Conclusion

The Settlement Agreement is granted final approval. The defendant banks are directed to advise me within seven business days of the date of this order whether they intend to ad-

here to the amendments to the Settlement Agreement. If they do, I will enter a final judgment to reflect that the Settlement Agreement, as amended by Amendment 2 and the memorandum to file (*see* footnote 3, *infra*), is granted final approval. If they do not, I will enter a final judgment on the Settlement Agreement.

SO ORDERED.

APPENDIX C

2000 WL 33241660 (E.D.N.Y.)

United States District Court, E.D. New York.
In re HOLOCAUST VICTIM ASSETS LITIGATION.
No. CV-96-4849-ERK-MDG.

Nov. 22, 2000.

MEMORANDUM & ORDER

KORMAN.

*1 On July 26, 2000, I filed a comprehensive opinion approving the settlement agreement in this case. *In re Holocaust Victim Assets Litigation*, 105 F.Supp.2d 139 (E.D.N.Y.2000). This opinion sets forth in detail the history of this case and the relevant terms of a settlement pursuant to which the defendants agreed to pay $1.25 billion to settle the lawsuit to compensate certain classes of victims of Nazi persecution whose injuries were either caused by, or exacerbated by, the alleged behavior of the Swiss bank defendants and other Swiss entities. I now write to address the recommendations of the Special Master with respect to the allocation of the $1.25 billion settlement fund. I assume familiarity with the underlying facts and the details of the Proposed Plan of Allocation and Distribution of Settlement Proceeds ("Proposed Plan").

Briefly, on March 31, 1999, in accordance with the terms of the Settlement Agreement, I appointed a Special Master "to develop a proposed plan of allocation and distribution of the Settlement Fund, employing open and equitable procedures to ensure fair consideration of all proposals for allocation and distribution." *Settlement Agreement* ¶ 7.1. "The decision [of the parties] to utilize a Special Master to propose a plan of allocation and distribution was motivated by a desire to spare

Holocaust survivors from being forced into an adversarial relationship that would have required them to squabble over a settlement fund that, while substantial, is necessarily insufficient to do full justice to all members of each plaintiff class. It was hoped that a neutral Special Master, acting with the guidance of the affected community, could conduct a serious inquiry into the facts and law, and propose a plan of allocation and distribution that would do non-adversarial justice to the claims of all class members." *Submission of Lead Settlement Counsel in Support of Special Master's Proposed Plan of Allocation* at ¶ 3.

I appointed Judah Gribetz to be the Special Master. He is an extraordinarily able lawyer with a long record of distinguished public service. He has served as Counsel to the Governor of the State of New York and as Deputy Mayor of the City of New York. He has contributed his time and energy to charitable and community organizations too numerous to recite. Most importantly, he has a deep understanding of all issues related to the Holocaust. He is a member of the Board of the Museum of Jewish Heritage-A Living Memorial to the Holocaust, which is located in New York. He is also the author of *The Timetables of Jewish History* (1993).

On September 11, 2000, the Special Master filed his Proposed Plan. Notice of the Proposed Plan was mailed on a rolling basis, starting in early September, 2000, in 21 different languages. *See Report of Settlement Class Counsel Regarding Implementation of Proposed Plan of Allocation* at Ex. A. 173, 380 copies of the full text of the Special Master's 38-page summary of the Proposed Plan, along with the more concise and condensed Notice were sent to Jewish, Jehovah's Witness, and Roma community organizations, world-wide. *Id.* at 1.

***2** In addition, copies of the Notice were mailed to all of the persons who had submitted correspondence or an Initial Questionnaire, in the appropriate language. Excluding duplicates, the Notice of the Proposed Plan was mailed to 472, 692 persons. *Id.* at 2. Notice was also posted on the Swiss Bank

Claims website (www.swissbankclaims.com), and the entire Proposed Plan was posted on that site as well, including all annexes. In response to the internet posting, and/or in response to organizational outreach efforts, an additional 30,469 persons requested and were mailed copies of the Notice of the Proposed Plan. *Id.* In total, 675,541 notices were distributed to persons and organizations. *Id*.

In response to the notice program described above, approximately 754 communications were received by the Notice Administrator. *Id.* A small number of additional persons or organizations responded in writing directly to the Court. A portion of the communications received in response to the notice of the Proposed Plan were sent by organizations purporting to represent multiple persons, or were sent in the form of petitions signed by many people. It is unclear how many of the persons who signed such petitions are actually members of the Settlement Classes, or submitted Questionnaires. It is known, however, that the overwhelming majority of the Settlement Class members-more than 99 percent-did not submit any comment regarding the Proposed Plan and presumably had no objection.

Of the 754 persons who submitted comments to the Notice Administrator, 561 could be matched with an Initial Questionnaire; 193 could not be matched with an Initial Questionnaire. *Id.* Of the 561 matches that could be made to an Initial Questionnaire, 415 were from claimants who identified as Jewish, 116 were from persons who did not identify themselves as a Victim or Target of Nazi Persecution. *Id.* Six were from persons who identified themselves as being or representing physically disabled. *Id.* Fifteen were from Romani. *Id.* Eight were from Jehovah's witnesses. *Id.*

Of the comments that could matched to a Questionnaire (561), 437 included Looted Assets claims, 90 included Deposited Asset claims, 212 included Slave Labor claims, and 24 included Refugee claims. *Id.* Roughly 40 percent of the persons who commented on the Proposed Plan, and who also

submitted a Questionnaire, were survivors; the rest were heirs. *Id.*

The world-wide nature of the response attests to the success of the program of the notice of the Proposed Plan. Only 152 of the comments were from persons or organizations residing in the United States; 92 were from Israel. *Id.* Most were from Eastern Europe and the former Soviet Union. Of the 754 comments, 360 were in Russian, and 115 were in Hungarian. *Id.* In addition to these informal submissions, a number of formal submissions and objections were filed. Professor Burt Neuborne, who has so ably served as plaintiff's lead counsel, filed a compelling response to those objections. On November 20, 2000, I conducted a public hearing on the plan at which approximately forty persons spoke either for themselves or on behalf of other individuals or organizations. After carefully considering all of the comments and objections, I adopt the Plan as submitted by the Special Master.

***3** In introducing his recommendations, the Special Master observes that he "has endeavored to present a Proposal that is not only fair and equitable, but also as meaningful as possible given the number of potential claimants and the limited sum to be divided among them." Proposed Plan at 3. I believe that the Special Master has succeeded in this endeavor. The Proposed Plan is the result of more than one year of extensive historical and factual research, reflecting the myriad complexities posed by the Special's Master's assignment: to recommend the division of a $1.25 billion fund among hundreds of thousands of Nazi victims as well as millions of other claimants, each of whom the Settlement Agreement mandates must fall within at least one of five settlement classes and, for four classes, at least one "victim or target" group.

I believe that the Special Master's recommendations on behalf of each of the five settlement classes-Deposited Assets, Looted Assets, Slave Labor I, Slave Labor II and Refugees-and on behalf of each of the five "victim or target"

groups-Jewish, Roma, Jehovah's Witness, homosexual and disabled Nazi victims-are carefully reasoned and well supported.

As contemplated by the Settlement Agreement, the Proposed Plan appropriately places priority upon returning to their rightful owners "the sums that Swiss banks have been holding for them for more than half a century," *Proposed Plan* at 12. The Proposed Plan properly allocates a substantial portion of the Settlement Fund to the Deposited Assets Class in accordance with the findings of the Volcker Committee, whose report I have previously observed "provided legal and moral legitimacy to the claims asserted here on behalf of the members of the Deposited Assets Class," and whose findings "suggest that the value of deposited assets held by the Swiss banks could exceed the $1.25 billion settlement amount." *In re Holocaust Victims Assets Litigation,* 105 F.Supp.2d at 153. Bearing in mind that any amount allocated to the Deposited Assets Class may be too low, on the one hand-because of the high values the Volcker Report has placed on the unclaimed accounts-and too high, on the other hand-because the passage of time has rendered it impossible to locate each owner of an unclaimed account-the Proposed Plan allocates approximately two-thirds of the Settlement Fund to the Deposited Assets Class.

This recommendation provides for immediate distributions among the members of each of the other four classes, and also enables the Court to redistribute among the class members any amounts not claimed under the $800 million Deposited Assets allocation. Moreover, as the Special Master explains in his report:

> In the event that any portion of the $1.25 billion Settlement Fund remains after "Stage 1" payments, which includes Deposited Assets claims, distributions to surviving Nazi victims who are members of the Looted Assets, Slave Labor I and II, and Refugee Classes, and fees and administrative expenses, a second round of pay-

> ments then can be made. During such a "Stage 2" of payments (if any) there can be additional distributions to surviving Nazi victims, and perhaps also to needy spouses and children of deceased Nazi victims. At that time, it also may be possible to allocate a portion of the remaining Settlement Fund to some of the proposed cultural, memorial or educational projects that have been submitted to the Special Master. To that end, the Special Master recommends that the Court review institutional proposals once an evaluation of the bank account claims, as well as the claims submitted by members of the other four classes, is completed.

***4** *Special Master's Proposal* at 19-20 (footnotes omitted).

I noted at the outset, quoting from Professor Neuborne, that the parties hoped that "a neutral Special Master, acting with the guidance of the affected community, could conduct a serious inquiry into the facts and law, and propose a plan of allocation and distribution that would do non-adversarial justice to the claims of all class members." *Submission of Lead Settlement Counsel in Support of Special Master's Proposed Plan of Allocation* at ¶ 3. I agree with Professor Neuborne's conclusion that: "The Special Master was remarkably successful in inviting and obtaining the guidance of interested members of the community. He conferred widely with an extraordinary array of persons who expressed a desire to provide advice or guidance on the fairest way to allocate the settlement proceeds. The openness and transparency of his deliberations adds immeasurably to the moral and legal persuasiveness of his proposed plan of allocation." *Id.* at ¶ 4.

Conclusion

For the foregoing reasons, and for all of the reasons set forth in the Proposed Plan, incorporated herein by reference, I adopt the Proposed Plan in its entirety. Because of my desire to proceed as expeditiously as possible, I also adopt Professor Neuborne's cogent and detailed responses to the objections voiced to the Plan without separately addressing each of them

here. I may file a supplemental memorandum addressing some of these objections.

Finally, I echo Professor Neuborne's acknowledgment of the work of the Special Master, and his staff. As Professor Neuborne observes in his submission:

> [O]n behalf of the settlement classes, and plaintiffs' counsel, I offer heartfelt thanks and appreciation to Mr. Gribetz and his devoted staff, especially Shari C. Reig, Ted Poretz and Alyson M. Weiss, for the successful completion of a task that enables the swift and fair distribution of the settlement fund, while respecting the dignity and individuality of every survivor.

Id. at ¶ 24.

SO ORDERED.

APPENDIX D

413 F.3d 183

United States Court of Appeals,Second Circuit.

In re: HOLOCAUST VICTIM ASSETS LITIGATION
Abraham Friedman, Eliazar Bloshteyn, and Sofiya Bloshteyn
Plaintiffs-Appellants,
v.
Jacob Friedman, et al., Plaintiffs-Appellees,
Union Bank Of Switzerland, Swiss Bank Corporation, Credit Suisse, and Swiss Bankers Association, Defendants-Appellees.
Docket Nos. 00-9595(CON), 00-9597(CON).

Argued July 19, 2001.
Decided July 26, 2001.
Reissued as a published opinion July 1, 2005.

Before: **WALKER**, Chief Judge, **LEVAL**, and **CABRANES**, Circuit Judges.

PER CURIAM.[1]

Plaintiffs-appellants Abraham Friedman, Eliazar Bloshteyn, and Sofiya Bloshteyn, are members of a class action brought against various Swiss banking institutions and entities (the "Swiss Banks") to obtain redress for their various

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[1] We originally issued this decision affirming the judgment of the district court as a summary order filed July 26, 2001, *In re Holocaust Victim Assets Litigation*, Nos. 00-9595(CON), 00-9597(CON), 14 Fed.Appx. 132 (2d Cir.2001). We now deem the decision-which we have not altered-to warrant publication.

actions in profiting from the Holocaust. They appeal from the November 22, 2000, order of the United States District Court for the Eastern District of New York (Edward R. Korman, *Chief Judge*) approving the Special Master's plan to allocate $1.25 billion in funds that have been obtained through an extensive settlement agreement that was entered into by the parties and approved by the district court.

Members of the class-who are by definition Jewish and non-Jewish persons that either were victims or targets of Nazi persecution or performed slave labor for Swiss corporations and their heirs-were allocated to one or more subclasses: the "Deposited Assets" class (those who claim ownership of deposit accounts withheld by the Swiss Banks after the War); the "Looted Assets" class (those who claim their property was looted by Nazis and then disposed of through the Swiss Banks); the "Slave Labor I" class (those who performed slave labor for German corporations whose profits were deposited with the Swiss Banks); the "Slave Labor II" class (those who performed slave labor for Swiss corporations); and the "Refugee" class (those who claim to have been denied entry into, expelled from, or mistreated while in Switzerland during the relevant time period).

After the settlement was approved by the district court as fair and reasonable, the district court appointed Special Master Judah Gribetz, Esq., to develop a plan to allocate and distribute the settlement proceeds. Appellants' objections to the resulting plan, as approved in the November 22, 2000 order, has prompted these appeals.

The district court has broad supervisory powers with respect to the administration and allocation of settlement funds, *see Beecher v. Able,* 575 F.2d 1010, 1016 (2d Cir.1978), and we "will disturb the scheme adopted by the district court only upon a showing of an abuse of discretion," *In re "Agent Orange" Prod. Litig.,* 818 F.2d 179, 181 (2d Cir.1987).

Appellant Friedman has objected to the appointment of the Conference on Jewish Material Claims Against Germany, Inc. (the "Claims Conference") as one of the organizations that will process claims and distribute funds under the settlement. Friedman, who disagrees with the policies and mission statements of the Claims Conference, asserts that the Claims Conference is not suited to the task and that the district court failed to carefully consider the selection of the Claims Conference or to explore other organizations that might have been used instead.

We find no error in the district court's decision. The Claims Conference was chosen because of its lengthy experience with similar programs and because it had already been chosen to process claims and distribute funds under the related German Foundation "Remembrance, Responsibility,***186** and the Future" settlement (the "German Foundation"), which shares many class members with the present litigation. The efficacy of having one organization process the claims of individuals entitled to recover from both programs cannot be gainsaid. Friedman argues that the district court might just as easily have chosen the International Organization on Migration (the "IOM"), which is also processing claims and distributing funds for the German Foundation. In fact, the IOM *was* chosen to process claims and distribute funds in this settlement: the Claims Conference will process the claims of Jewish class members for both programs, while the IOM will process the claims of non-Jewish class members for both programs.

Appellants Eliazar and Sofiya Bloshteyn object to (1) the inadequacy of the total settlement amount of $1.25 billion; (2) the allocation of $800 million to the "Deposited Assets" class, including adjustments for interest, fees, and inflation; (3) the application of the doctrine of *cy pres* to resolve the claims of the "Looted Assets" class, rather than require-or permit-claimants to put forth documentary evidence of their

actual losses; and (4) the asserted limitation of "applications" to 560,000.

We note that the Bloshteyns-who successfully moved for reinstatement after their appeal had earlier been dismissed for failure to pay filing fees or timely move to proceed *in forma pauperis*-have arguably defaulted on their appeal because their letter brief was not filed until two weeks after the filing deadline and they failed to seek leave for an extension. In any event, we find that their claims lack merit.

The settlement sum of $1.25 billion, which was the result of more than a year of negotiations conducted among the parties and moderated by the district court, was premised in part on economic analyses that estimated the Jewish wealth likely to have flowed into Swiss banks on the eve of the Holocaust. The district court's approval of the sum after such extensive negotiations and considered analysis was not an abuse of discretion. We also find that the district court did not abuse its discretion in allocating $800 million to the "Deposited Assets" class. The existence and estimated value of the claimed deposit accounts was established by extensive forensic accounting. In addition, these claims are based on well-established legal principles, have the ability of being proved with concrete documentation, and are readily valuated in terms of time and inflation. By contrast, the claims of the other four classes are based on novel and untested legal theories of liability, would have been very difficult to prove at trial, and will be very difficult to accurately valuate. Any allocation of a settlement of this magnitude and comprising such different types of claims must be based, at least in part, on the comparative strengths and weaknesses of the asserted legal claims. *See In re "Agent Orange"*, 818 F.2d at 183-84 (approving equitable allocation of settlement funds based on "weigh[ing of] the relative deservedness" of the claims); *Curtiss-Wright Corp. v. Helfand*, 687 F.2d 171, 174 (7th Cir.1982) (holding that limited settlement fund requires allocation based on equitable principles such as the strength of

competing claims). Finally, we assume that appellants' claim that they should be allowed to provide proof of their actual loss of property refers to claims of the "Looted Assets" class. While we find that their claim lacks legal merit, we note that counsel for the plaintiffs-appellees has indicated in the context of an unrelated appeal that members of the "Looted Assets" class may be able to file such documentary proof of actual losses with the German Foundation.

***187** We have carefully considered appellants' remaining claims and find them to lack merit. Accordingly, for the reasons set forth above, the judgment of the district court is hereby **Affirmed**.

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

IN RE: HOLOCAUST VICTIM ASSETS LITIGATION	:	Case No. CV 96-4849 (ERK)(MDG) Consolidated with CV 96-5161 and CV 97-461
	:	**MEMORANDUM & ORDER**
This Document Relates to: All Cases	:	

KORMAN, Chief Judge:

On August 16, 2001, following the July 26, 2001 decision of the United States Court of Appeals for the Second Circuit upholding the Plan of Allocation and Distribution of Settlement Proceeds ("Distribution Plan"), I ordered the Escrow Fund agents to transfer the settlement payments from what had been the Escrow Fund into the Settlement Fund. Since that time, the $1.25 billion Settlement Fund has benefited from unanticipated interest income. The Settlement Fund also has benefited from tax legislation exempting from federal taxes individual distributions from the Settlement Fund, and the Fund itself. See Economic Growth and Tax Relief Reconciliation Act of 2001, Section 803 ("No Federal Income Tax on Restitution Received by Victims of the Nazi Regime or their Heirs or Estates"). I requested that Special Master Gribetz review the available information to determine whether there are sufficient excess funds to provide supplemental distributions to class members.

The Special Master has consulted with various parties including Claims Resolution Tribunal ("CRT") Special Masters Volcker and Bradfield, Lead Settlement Counsel Neuborne, Settlement Fund accountant Eisner LLP, and the claims administrators (the CRT, Conference on Jewish Material Claims Against Germany, International Organization for Migration and American Jewish Joint Distribution Committee). His findings are set forth in his letter to the Court dated August 19, 2002, incorporated herein. Based upon the current and projected income to and distribution from the Settlement Fund, he has recommended a 45% proportionate adjustment to the amounts previously designated for distribution to members of Slave Labor Class I, the Refugee Class and the Looted Assets Class. The cost of the additional 45% distribution to those who already have received payments is approximately $63 million; the estimated total going forward is approximately $102 million. The funds are derived from unanticipated tax relief and interest already earned on the Settlement Fund.

Under this proposal, payments to members of Slave Labor Class I – the over 115,000 individuals who were already have received or have been approved for payment, As well as those applications currently are under review – will increase from $1,000 to $1,450. Payments to individuals who were expelled from Switzerland or denied entry as refugees will now increase from $2,500 to $3,625; those admitted into Switzerland as refugees but mistreated will receive $725 (from $500). Humanitarian aid distributions to needy members of the Looted Assets Class will increase from $100 million to $145 million.

The proposed distributions will not diminish the $800 million currently reserved for the Deposited Assets Class; however, with Special Masters Volcker and Bradfield, Special Master Gribetz recommends certain adjustments to the timing of Deposited Assets Class payments. Most members of the Deposited Assets Class receive an initial payment of 35% of

the total award, to be followed by a payment of up to the remaining 65% of the award once the claims review process has been completed. The Special Master's August 19, 2002 letter advises that Special Masters Volcker and Bradfield, based upon their analysis of the claims submitted to the CRT, recommend that these payments be reversed so that the initial payment is increased to 65% of the total award to be followed by payments of up to the remaining 35%. Additionally, they recommend that the CRT pay in full any Deposited Assets award where the claimant is 75 years of age or over. As with the Slave Labor I, Refugee and Looted Assets Classes, these adjustments are to apply retroactively as well as to future compensation payments from the Settlement Fund.

I concur with these recommendations. Accordingly, it is hereby

ORDERED that Settlement Fund distributions hereinafter are to be made in the following amounts: (1) **Slave Labor Class I** members are to receive $1,450 (2) **Refugee Class** members who were denied entry into or expelled from Switzerland are to receive $3,625 and Refugee Class members who were admitted into Switzerland but mistreated are to receive $725; (3) annual requests for funding from the three administrative agencies distribution humanitarian *cy pres* funds to needy members of the **Looted Assets Class** are to reflect the 45% increase described herein; and (4) **Deposited Assets Class** members aged 75 and over are to receive payment in full of their CRT awards, while class members who currently receive initial payments of 35% under the Distribution Plan and Rules Governing the Claims Resolution Process, are to instead receive initial payments of 65% to be followed at the end of the claims resolution payments of 65% to be followed at the end of the claims resolution process by payments of up to the remaining 35% of the award.

To enable the administrative agencies retroactively to increase the payments to class members that already have been made from the Settlement Fund, it is further

ORDERED that the signatories to the Settlement Fund are hereby directed to transfer the sums specified below to the claims administrators:

(1) **Claims Conference and IOM: $53,725,500 is to be transferred to the Claims Conference, and $646,200 is to be transferred to the IOM,** each of which shall arrange for supplemental payments of (a) $450 to each of the 115,635 members of Slave Labor Class I who received or were approved for payment prior to the date of this order (115,199 via the Claims Conference, Groups I through 8; another 436 via the IOM, Groups 1 through 3); (b) $1,125 to members of the Refugee Class who were denied entry into or expelled from Switzerland, and $225 to those who were admitted but mistreated, and who received or were approved for payment prior to the date of this order (via the Claims Conference, Groups 1 through 4) and (c) 45% increases in the Looted Assets Class *cy press* funds distributed or scheduled for distribution by each organization thus far (to date, $3,825,000 by the Claims Conference and $1,000,000 by the IOM). The Looted Assets Class increases are to be allocated and distributed proportionately in accordance with, respectively, the IOM Supplemental Proposal for Humanitarian and Social Programmes dated June 10, 2002 and approved by Memorandum and Order dated June 24, 2002, and the Second Claims Conference Looted Assets Class Proposal dated July 11, 2002 and approved by Memorandum & Order dated July 22, 2002.

(2) **JDC: $3,375,000, is to be transferred to the JDC**, a 45% increase in the $7.5 million distributed thus far to the "Hesed" and other humanitarian assistance programs serving needy Jewish victims of Nazi persecution in the former Soviet Union. This sum is to be distributed proportionateley in accordance with the JDC's February 27, 2001 Proposal for the First Year of Operations, as supplemented by the JDC's April 4, 2001 report, and approved by orders dated April 13, 2001 and June 28, 2001.

(3) **CRT: $9,359,914.61 is to be transferred to the Awards Payment Account of Special Masters Volcker and Bradfield for funding of the Claims Resolution Process.** From this sum, $3,829,920.79 will be applied to increase by 30% each of the Deposited Assets Class awards approved to date for which partial payments has been approved (i.e., CRT Groups I through 10), thus bringing the total paid on each such award to 65%. The remaining $5,529,993.82 will be applied by the CRT to pay in full those claimants aged 75 and over who have been approved for partial payments thus far.

I will issue additional orders transferring further sums from the Settlement Fund as applications from other class members are approved.

Brooklyn, New York
September 25, 2002

SO ORDERED:

/s/ Edward R. Korman
Edward R. Korman
United States District Judge

APPENDIX F

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

IN RE:	:	Case No. CV 96-4849 (ERK)(MDG)
HOLOCAUST	:	
VICTIM ASSETS	:	Consolidated with CV 96-5161
LITIGATION	:	and CV 97-461
This Document	:	
Relates to: All Cases	:	

MEMORANDUM & ORDER ADOPTING SPECIAL MASTER'S INTERIM REPORT ON DISTRIBUTION AND RECOMMENDATION FOR ALLOCATION OF EXCESS AND POSSIBLE UNCLAIMED RESIDUAL FUNDS

KORMAN, Chief Judge:

On October 2, 2003, the Special Master filed with the Court his Interim Report on Distribution and Recommendation for Allocation of Excess and Possible Unclaimed Residual Funds ("Interim Report"). The Interim Report is posted on the Internet site for this lawsuit, www.swissbankclaims.com. The Special Master also filed and posted on the Internet site a summary Notice of the Interim Report, a copy of which is attached hereto.

As described in th Interim Report, thus far, approximately $485 million has been distributed or allocated to class mem-

bers in the little more than two years since the resolution of appeals against the Settlement Agreement and the Plan of Allocation and Distribution of Settlement Proceeds ("Distribution Plan"). Almost $203.5 millions has been distributed to members of the two slave labor classes; approximately $131.5 million has been returned to members of the deposited assets class; nearly $4.6 million has been distributed to members of the refugee class; and $145 million has been distributed or committed to programs providing food, medicine, shelter, and other humanitarian assistance to needy "Victims or Targets of Nazi Persecution" under the cy pres principles governing administration of the looted assets class.

The Special Master has recommended that $60 million in currently available excess funds, derived primarily from interest on the Settlement Fund, should be allocated wholly to needy Nazi victims following the same cy pres principles described above. This recommendation is hereby adopted. I will address the objections of the Holocaust Survivor's Foundation-USA, Inc. and Robert Swift on the merits in an opinion to follow. Nevertheless, I agree with Professor Neuborne that the HSF has failed to establish that it has legal standing to object to the recommendation. Supplemental Neuborne Declaration, page 1, n.1.

It is therefore ORDERED that

1. the $60 million currently available excess funds shall be allocated proportionately among the same "Victim or Target" groups and the same geographic regions enunciated in the Distribution Plan, and administered on the Court's behalf by the same three agencies: the American Jewish Joint Distribution Committee (JDC"); the Conference on Jewish Material Claims Against Germany ("Claims Conference"); and the International Organization for migration ("IOM").

2. The distribution of the $60 million in excess funds shall commence with the calendar year 2004 and con-

tinue over 7 ½ years, the duration of the Looted Assets Class programs for needy Nazi victims as adopted under the Distribution Plan. Beginning January 1, 2004, each administrative agency shall incorporate its respective proportion of the $60 million in excess funds into all funding requests, and shall allocate the distribution of the funds in accordance with Court-approved multi-year plans to provide sustainable levels of targeted essential social services.

All funds received form the Settlement Fund for purposes of distribution to needy Nazi victims shall be used solely to augment and not replace funds the JDC, Claims Conference and IOM currently receive or are scheduled to receive from other sources. To the extent that any donor other than the Court advises any of the three administrative agencies that its funding of the agency is to be reduced as a result of any distributions made from the Settlement Fund, that agency shall immediately so advise the Court and the Special Master. The Court will modify this order accordingly, including, but not limited to, by reducing or eliminating the allocation of Settlement Funds to that administrative agency.

In accordance with the Special Master's recommendation that proposals be solicited for the allocation of possible unclaimed residual funds from the $1.25 billion Settlement Fund, it is hereby ORDERED that any person or organization who seeks to offer a plan for providing assistance to needy Nazi victims shall file a proposal specifying at least the following information.

1. Number and location of Nazi victims for the proposed "Victim or Target" group to be served (e.g., Jewish, Roma, Jehovah's Witness, homosexual and/or disabled), including (a) estimates of victims in Israel, the Former Soviet Union, Europe (including nation-by-nation), the United States (including state-by-state); Australia; South America and elsewhere; and (b) source

materials upon which the data is based, including any expert opinion(s) relied upon;

2. Number and location of **needy** Nazi victims among the proposed "Victim or Target" group to be served, in accordance with the criteria set forth in item 3 below, including (a) estimates of victims in Israel, the Former Soviet Union, Europe (including nation-by-nation), the United States (including state-by-state); Australia; South America and elsewhere; and (b) source materials upon which the data is based, including any expert opinion(s) relied upon;

3. Assessment of survivor needs, including (a) analysis of specific requirements (e.g., medication, food, nursing care), taking into account different social safety nets available by geographic location and availability of other sources of assistance (b) survivor longevity estimates by geographic location; and (c) absolute and relative poverty levels by geographic location, specifying, among other data, national statistics, United Nations and comparable non-governmental organization information;

4. Recommendation for distribution, specifying types of assistance, estimated number of recipients, length of programs(s), and estimated costs (using percentages rather than specific dollar amounts where necessary);

5. Recommended distribution agency or agencies, including (a) description of prior experience with humanitarian aid distribution in general and programs serving Nazi victims in particular; (b) estimated administrative expenses (using percentages where necessary); and (c) where available, attach latest financial and/or other programmatic reports for recommended agency; and

6. Names, addresses and affiliations of all persons and organization associated with or endorsing the proposal.

It is further ORDERED that all such proposals shall be postmarked by December 31, 2003 and mailed to following address:

Holocaust Victim Assets Litigation

P.O. Box 8300

San Francisco, CA 94128-8300

All comments on such proposals shall be postmarked by February 15, 2004, and mailed to the same address. All proposals and comments on such proposals shall be made part of the public Court file and/or posted by the Special Master at www.swissbankclaims.com. Any person or organization who wishes to comment upon the Special Master's recommendation to use unclaimed residual funds, if any, for needy Nazi victims shall mail these comments to the address listed above. The comments shall be postmarked by December 31, 2003. The Special Master shall review the proposals and on or about March 15, 2004 shall file with the Court and post on the Internet site his final recommendations for distribution of any residual unclaimed funds that may remain from the Settlement Fund. On April 1, 2004, at 10:00 a.m., I will hold a hearing on the Special Master's final recommendations.

SO ORDERED:

/s/ Edward R. Korman

Dated: September 25, 2002
Brooklyn, New York

Edward R. Korman
United States District Judge

APPENDIX G

302 F.Supp.2d 89

United States District Court,E.D. New York.

In re HOLOCAUST VICTIM ASSETS LITIGATION.
Nos. CV-96-4849(ERK)(MDG), CV-99-5161, CV-97-461.

March 9, 2004.

MEMORANDUM & ORDER

KORMAN, Chief Judge.

I address here yet another issue that has arisen with respect to the $1.25 billion settlement of the class action against the largest Swiss banks, Credit Suisse, Union Bank of Switzerland and the Swiss Bank Corporation (the latter two of which merged during the course of litigation). The background of the case and settlement is set out in *In re Holocaust Victim Assets Litigation,* 105 F.Supp.2d. 139 (E.D.N.Y.2000), and a discussion of some of the post-settlement issues may be found at *In re *91 Holocaust Victim Assets Litigation,* No. CV-96-4849, 302 F.Supp.2d 59, 2004 WL 318468 (E.D.N.Y. February 19, 2004), *In re Holocaust Victim Assets Litigation,* 270 F.Supp.2d 313 (E.D.N.Y.2002), and at *In re Holocaust Victim Assets Litigation,* No. 96 Civ. 4849ERK MDG, 2000 WL 33241660 (E.D.N.Y. November 22, 2000).

The specific issue here involves a dispute relating to the allocation of part of the proceeds of the settlement. Briefly, one of the classes benefitting from the settlement was comprised of victims of Nazi persecution from whom assets were looted by the Nazis and the plunder of which was aided by Swiss banks. Special Master Judah Gribetz recommended initially that $100 million be allocated to this Looted Assets

Class and that the money be distributed to its neediest members. *See* Special Master's Proposed Plan of Allocation and Distribution of Settlement Proceeds 110-142 (hereafter "Plan of Allocation"). I discuss later the reasons underlying that recommendation, which I adopted on November 22, 2000, *see In re Holocaust Victim Assets Litig.*, 2000 WL 33241660, and which the Second Circuit affirmed on July 26, 2001. *See In re Holocaust Victim Assets Litig.*, 14 Fed.Appx. 132, 134 (2d Cir.2001). On September 25, 2002, I adopted another recommendation of the Special Master that an additional $45 million in "excess" funds be allocated to that class. Finally, on November 17, 2003, I adopted the recommendation of the Special Master that $60 million in "excess" funds be allocated to the Looted Assets Class and be distributed in accordance with the *cy pres* principles that have successfully governed the administration of the initial allocation and distribution of $100 million to the Looted Assets Class in 2001, and the first supplemental allocation and distribution of $45 million in 2002.

I also adopted the Special Master's recommendations made in response to my request seeking his view on the appropriateness of allocation of money, if any, that may remain undistributed from the $800 million allocated to the Deposited Assets Class, which is composed largely of heirs of victims of Nazi persecution who deposited funds in Swiss banks. The Special Master recommended that, "as with the excess funds, residual unclaimed funds, if any, should likewise be re-allocated to the Looted Assets Class for distribution to needy Nazi victims in accordance with the *cy pres* principles governing the administration of that class." Special Master's Interim Report on Distribution and Recommendation for Allocation of Excess and Possible Unclaimed Residual Funds, at 7 (hereafter "Special Master's Interim Report"). Because any such distribution would involve residual unclaimed funds, "the disposition of which has not yet been the subject of discussion by class members, the Special Master recommend[ed]

that the Court solicit proposals from a broad array of interested persons and organizations as to how best to identify and to benefit the neediest survivors." *Id.* He further urged that, "depending upon the amount of residual, if any, the Court may wish to consider a modest distribution to communal, remembrance and/or educational programs." *Id.* at 13 n. 14.

The Special Master observed that, by the end of the proposed filing and comment period in connection with proposals submitted by interested persons and organizations, a reasonably firm Deposited Assets Class distribution assessment should be available, rendering it possible to estimate the amount of unclaimed funds, if any, available for *cy pres* distribution. At that point, after considering such proposals, the Special Master will issue a final recommendation as to how to distribute unclaimed funds. The date provided in my ***92** November 17, 2003 order for the submission of the final recommendation of the Special Master was March 15, 2004. I subsequently received numerous requests for additional time to submit proposals, and I extended the date for the Special Master's final recommendation to April 16, 2004. After a public hearing to be held on April 29, 2004, I will make a final determination as to the distribution of any residual funds.

My order of November 17, 2003 also explicitly rejected objections that had been filed by Samuel Dubbin on behalf of the Holocaust Survivors Foundation-USA, Inc., (HSF-USA), and those filed by Robert Swift. I indicated then that an opinion would follow, and I now provide that opinion. The Special Master's Interim Report, the Declaration of Burt Neuborne in Support of the Interim Report of the Special Master (hereafter "Neuborne Declaration"), and the Supplemental Declaration of Burt Neuborne in Response to Objections to the Special Master's Interim Report and Recommendation Filed by Samuel Dubbin, Esq. (hereafter "Supplemental Neuborne Declaration") provide a compelling case for the adoption of the recommendation of the Special Master. The principal purpose of this memorandum is to more specifically

address the objections filed by Mr. Dubbin on behalf of HSF-USA.

Mr. Dubbin has been filing objections for several years, all premised on the same flawed reasoning. *See* Motion for Immediate Interim Distribution of Swiss Settlement Proceeds, filed September 11, 2003 (hereafter "Motion for Immediate Distribution"); Response of Holocaust Survivors Foundation-USA, Inc. to Special Master's Interim Recommendation (hereafter "HSF Response"); Objections of U.S. Survivor Groups to Special Master's Recommendations Concerning Allocation of Accumulated Interest on Settlement Funds, filed September 27, 2002 (hereafter "HSF Objection to Allocation of Interest"). While the HSF-USA has never demonstrated that it has any legal standing to raise these objections (a point I will discuss later), it is important to address them on the merits. Professor Neuborne has done so in a characteristically comprehensive and thoughtful affidavit. *See* Supplemental Neuborne Declaration. I do so here.

Part I: The Merits of HSF-USA's Objections

As Professor Neuborne observed, HSF-USA's objections can be divided into three categories. First is Mr. Dubbin's demand that I make a larger amount available for "immediate distribution" to members of the Looted Assets Class. Second is his objection to the allocation formula that has thus far governed the distribution of money to the Looted Assets Class. And third is his challenge to my continued use of the American Jewish Joint Distribution Committee, Inc., for distribution of settlement funds. As to the third objection, I adopt Professor Neuborne's response without repeating it. *See* Supplemental Neuborne Declaration, at ¶ 22; *see also* Letter from Steven Schwager to Professor Neuborne, dated October 29, 2003. I address the first and second objections below.

A. Mr. Dubbin's demand for a larger "immediate distribution"

The Special Master proposed, and I ordered, that the $60 million in excess funds that have accrued through interest on the settlement fund be made available for immediate distribution to members of the Looted Assets Class. Instead of this distribution of $60 million, Mr. Dubbin would have me allocate to the Looted Assets Class $200 million of the $650 million that remains set aside for possible distribution to claimants to accounts in Swiss ***93** banks that were either unpaid or transferred improperly to the Nazis. *See* Motion for Immediate Distribution. Of the $200 million, Mr. Dubbin demands that a minimum of $50 million be set aside for "immediate distribution" to survivors in the United States. *Id.* I reject Mr. Dubbin's objection.

First and foremost, Mr. Dubbin's proposal does not call for the "immediate distribution" of any funds to survivors, as the title of his motion and its introduction misleadingly suggest. Rather, Mr. Dubbin proposes that $50 million be "set aside in trust to be spent in accordance with the decisions of a committee of HSF survivors," representatives of other organizations, and "the Court." Motion for Immediate Distribution, at 1 n. 1. This "Dubbin Committee," of which he proposes to make me a member, would make decisions on "[t]he use of such funds ... guided by an assessment of current need, and the likelihood and timing of funds from other sources such as the Claims Conference (Successor Organization Funds), the International Commission for Holocaust Era Insurance Claims (ICHEIC) 'humanitarian funds,' and the Final Secondary Distribution in this case." *Id.* The "Dubbin Committee" proposal foreshadows a drawn-out process rife with potential for disagreement among its members. Indeed, disagreement leading to the resignation of several founding members of HSF-USA has already occurred. *See* Nacha Cattan, *Survivors' Group Leaders Split Over Aid,* The Forward, January 16, 2004; *see also* Israel J. Sachs et al., Letter to the Editor, The Forward, January 23, 2004 ("It is our belief that our goals should be pursued through discussion and negotiation, not by

fights that pit one Jew against another."). Such a committee (which may or may not be able to distribute money faster than the procedures currently employed) is not necessary. Nor is it consistent with the control-not a seat on a committee-that the law requires that I exercise over the distribution process.

More importantly, the time is simply not ripe for a larger "immediate distribution" of residual funds to members of the Looted Assets Class. Mr. Dubbin claims that, "[t]here is over $670 million dollars under the Court's control right now, sitting in the bank, helping no one other than the bankers." HSF Response, at 2. He continues, "[t]his money is, legally and morally, *the Survivors' money.*" Motion for Immediate Distribution, at 10. These statements reveal Mr. Dubbin's basic misunderstanding of the settlement. The $800 million that was set aside for individuals with claims against the Swiss Banks for deposited assets (of which approximately $650 million now remains) belongs to *those* survivors or their heirs. It was not set aside for, nor does it belong to, the survivor community as whole. This large sum was set aside in part because, of all the claims asserted against the Swiss Banks, only the claims of the Deposited Assets Class have any legal merit. The other claims could not have withstood a motion to dismiss. As the Second Circuit explained in affirming my decision:

> [The Deposited Assets Class] claims are based on well-established legal principles, have the ability of being proved with concrete documentation, and are readily valuated in terms of time and inflation. By contrast, the claims of the other four classes are based on novel and untested legal theories of liability, would have been very difficult to prove at trial, and will be very difficult to accurately valuate.

In re Holocaust Victim Assets Litig., 14 Fed.Appx. 132, 134 (2d Cir.2001).

Under these circumstances, I have a legal and moral obligation to the Deposited ***94** Assets Class not to use the funds

that belong to it for a *cy pres* distribution until I am *certain* that the claims to those funds will not exceed the amount set aside. The $800 million set aside already takes into account the certainty that, due to the passage of time, the destruction of documents and the slaughter of millions, claims awarded will not equal the current value of accounts identified by the Volcker Committee as probably or possibly belonging to survivors. Indeed, it is a half billion dollars less than the present value of such accounts. Moreover, as I explained in my order of February 19, 2004, *see In re Holocaust Victim Assets Litig.*, No. CV-96-4849, 302 F.Supp.2d 59, 2004 WL 318468 (E.D.N.Y. February 19, 2004), the accounts identified by the Volcker Committee as probably or possibly belonging to Nazi survivors understate significantly the number of accounts once belonging to survivors.

Nevertheless, Mr. Dubbin argues that "$200 million is a sum that no reasonable person would argue is too high of a minimum estimate of the amount that will remain from the $800 million set aside for Deposited Assets such that the allocation of the amount today would interfere with the payment of meritorious pending claims." Motion for Immediate Distribution, at 3. I disagree. Whether $200 million will remain from the $800 million set aside for the Deposited Assets Class is not yet knowable. The Special Master has indicated that several things must happen before he can accurately estimate the amount of residual funds, if any, that will remain from money allocated to the Deposited Assets Class. Of primary importance, additional accounts should be published in order to help identify any remaining claimants; the Claims Resolution Tribunal ("CRT") must complete an experimental trial of matching names against accounts in the Total Accounts Databases ("TAD"); the CRT must then be given broader access to the TAD if the experimental matching so demands; and the CRT must be given time to use a newly improved computer system in an effort to match claimants' names against accounts that might have belonged to Nazi victims. Of

course, several of these steps have yet to be completed. *See In re Holocaust Victim Assets Litig.*, 302 F.Supp.2d 59, 2004 WL 318468.

The order I have signed directs the Special Master to provide an accurate estimate of the amount set aside for the Deposited Assets Class that will not be distributed to the members of that class, if any, by April 16, 2004. Because of ongoing concerns described in the paragraph above, it appears that more time may be required. Nevertheless, whether or not it is possible for him to provide an accurate estimate by April 16, 2004, he will by that date provide a recommendation for the *cy pres* distribution of any residual funds. After hearing proposals from interested parties, I will decide on a plan of allocation. Because of my obligations to the Deposited Assets Class, I reject Mr. Dubbin's objection that this delay is unreasonable. In advance of hearing all proposals and the Special Master's recommendation, I will not allocate $50 million "in trust" to a committee to decide how it should be spent. Nor will I set aside an additional $150 million that belongs to bank account holders or their heirs for distribution among the survivor community as a whole.

B. Mr. Dubbin's challenge to the allocation formula used in distributing funds

Mr. Dubbin also objects to the allocation formula that governs the distribution of the additional $60 million that is now being allocated. This objection is consistent with his prior appeal from the initial allocation of $100 million to needy ***95** members of the Looted Assets Class and his objection to the $45 million allocated to needy victims of Nazi persecution in the first allocation of excess funds. Mr. Dubbin withdrew his appeal from the initial allocation, and I denied his objection to the first allocation of excess funds as untimely. Mr. Dubbin has filed a motion for reconsideration of that order and he has filed a motion for reconsideration in reference to the most recent denial, both of which are still pend-

ing. I have never specifically addressed his objections on the merits.

Mr. Dubbin's objections can be summarized as follows: He agrees that funds allocated to the Looted Assets Class should be distributed through a *cy pres* distribution to the neediest survivors, but only after distributing the funds *pro rata* among countries. Put differently, he argues that a survivor community in a given country should be allocated (for the benefit of its neediest survivors only) a percentage of the Looted Assets Class funds equal to whatever percentage of the world survivor community it represents. This proposal is tailored to benefit individuals who are a part of a small group of needy survivors within a large nationwide survivor population. Not surprisingly, needy survivors in the United States-whose interests Mr. Dubbin claims to represent-are just such a group. This proposed distribution scheme is wholly inconsistent with law, morality, and most importantly, the settlement of this lawsuit. In sum, these objections are frivolous. Several are also likely precluded by the withdrawal of Mr. Dubbin's initial appeal. But because the objections have been recurring, I address them now in the hope that they can be put to rest.

1. The rationale for my distribution plan

The reasons underlying the distribution plan that I have overseen for the Looted Assets Class are described comprehensively in the Special Master's Plan of Allocation. Nevertheless, because of Mr. Dubbin's apparent misunderstanding of these reasons, I take this opportunity to explain, once again, how we are distributing the money.

The Looted Assets Class is incredibly large. It consists of:

> Victims or Targets of Nazi Persecution and their heirs, successors, administrators, executors, affiliates, and assigns who have or at any time have asserted, assert, or may in the future seek to assert Claims against

> any Releasee for relief of any kind whatsoever relating to or arising in any way from Looted Assets or Cloaked Assets or any effort to recover Looted Assets or Cloaked Assets.

Settlement Agreement, Section 8.2(b). As the Special Master correctly reasoned, "[t]here is scarcely a victim of the Nazis who was not looted, and on nearly an incomprehensible scale." Plan of Allocation, at 111. After all, "it is well accepted by historians, including those representing Switzerland, that a primary purpose of the Nazi plunder was to transform loot (especially, but not only gold) into foreign currency by marketing these items in neutral nations, including Switzerland." *Id.* at 114. "With only limited exceptions, however, the current historical record simply does not permit precise determinations even as to the material losses in total, much less the nature and value of the loot traceable to Switzerland or Swiss entities." *Id.* at 112. To prevent the expenditure of incredible sums on administration, the Special Master recommended that for allocation purposes, I assume that all survivors of the Holocaust and their heirs were valid members of this class, even if they could not prove an injury directly tied to a Swiss entity. I agreed.

***96** I then was faced with two obvious and unsatisfactory possibilities for how to govern the distribution of money to this enormous class. I could have used a claims resolution facility to determine the validity and value of claims on a case-by-case basis, or I could have ordered a *pro rata* distribution to every member of the class. The first option, given the complete lack of adequate records, would have resulted in "an unwieldy and enormously expensive apparatus to adjudicate hundreds of thousands of claims, for losses which can barely be measured and hardly be documented, and whose connection to Switzerland, or a Swiss entity, if ever it existed, probably no longer can be proven." *Id.* at 114-15. The second option, which is apparently what Mr. Swift-whose objections I rejected in my November 17, 2003 order-would prefer,

was equally problematic. Mr. Swift continues to argue that there should be a *pro rata* distribution to the approximately 500,000 Looted Assets Class members who filled out "detailed claim forms." Declaration of Robert A. Swift in Opposition to the Interim Report of the Special Master, ¶ 3. These "detailed claim forms" were non-binding questionnaires that explicitly stated that an individual could later make a claim without having filled out such a questionnaire. The class, therefore, is not limited to these 500,000 individuals. Rather, for allocation purposes, the class includes all those who were victims of the Holocaust *and their heirs.* A *pro rata* distribution would have resulted in the payment of literally pennies to each of the millions of individuals who would fall into this class. Such a distribution scheme is not uncommon in class action cases where members of the class get pennies or coupons, the cumulative total of which is used to justify awarding millions of dollars in legal fees. But such a plan is wholly unsatisfactory here because it promises almost no benefit to members of the class. Indeed, if Mr. Swift's proposal were the only alternative, I would ask the Special Master to suggest a *cy pres* distribution of the excess funds for a purpose other than providing assistance to members of the Looted Assets Class.

Fortunately, there is a more reasonable alternative. The Special Master recommended excluding heirs from any *pro rata* distribution, as was done with the Refugee and Slave Labor classes. While this would have increased the *pro rata* share of survivors, it would still have resulted in one-time individual awards that would not have been enough to provide any assistance to needy survivors and would have been insignificant to those who are not needy. Consequently, I adopted the accompanying recommendation of the Special Master and ordered a *cy pres* remedy targeting the neediest survivors in the Looted Assets Class. *See* Special Master's Interim Report, at 3 n. 3. The Special Master reasoned that these individuals "perhaps would be less in need today had their assets

not been looted and their lives nearly destroyed" during the Nazi era. Plan of Allocation, at 117. I agreed that using the funds to provide relief to these neediest survivors over the course of ten years would be the way to most benefit the class as a whole. In order to reduce administrative costs, these funds were funneled through organizations that were already providing relief to survivor communities and could quickly provide aid. I reserved the right to grant other *cy pres* remedies as worthwhile proposals are presented, but my principal decision was consistent with Second Circuit law. *See In re Agent Orange Product Liability Litig.*, 818 F.2d 145, 158 (2d Cir.1987) (explicitly authorizing a district court to "give as much help as possible to individuals who, in general, are most in need of assistance" because it is "equitable to limit payments to those *97 with the most severe injuries"). Indeed, the Second Circuit agreed. *See In re Holocaust Victim Assets Litig.*, 14 Fed.Appx. 132 (2d Cir.2001) (finding that appellants' challenge to my decision to apply the *cy pres* doctrine to the Looted Assets Class "lack[ed] merit").

The next step, which is apparently the only step at which Mr. Dubbin and I diverge, was the determination of who are the neediest survivors of the Holocaust. A comparison of needy survivors is by definition an odious process. All individuals who survived the Holocaust bear scars, and all merit relief. Nevertheless, left with limited funds to distribute, I had to render a judgment as to whose need was the greatest. I decided that 90% of the funds should be awarded to Jewish survivors, and 10% should be awarded to other victims of the Holocaust, including surviving Roma, Jehovah's Witness, homosexual and disabled victims of Nazi persecution. This decision was consistent with restitution agreements dating back to the end of the war and with current assessments of demographics. *See* Plan of Allocation, at 118-19 and Annex C ("Demographics of 'Victim or Target' Groups"). Of the 90% awarded to Jewish survivors, I determined that 75% should be allocated to needy survivors living in the Former

Soviet Union ("FSU"), and 25% should be allocated to needy survivors living in Israel, North America, Europe, and the rest of the world. Ultimately, approximately 4% of the funds from the Looted Assets Class has been allocated to needy survivors in the United States. The decision to allocate 75% of the money awarded to Jewish members of the Looted Assets Class to needy survivors in the FSU while allocating only 4% of the money to needy survivors in the United States was not arrived at lightly. It was based on what I perceived to be the number of impoverished survivors in each country, their relative need, and their other available sources of support. However, it is this decision that caused Mr. Dubbin to object. Thus, it is this division, 75% as compared to 4%, on which I focus.

2. Identifying the neediest survivors

According to the most comprehensive demographic studies available, there are between 832,000 and 960,000 Jewish survivors of Nazi persecution. *See generally* Plan of Allocation, Annex C (explaining the demographic data). Of these, approximately 19%-27% live in the FSU, and 14%-19% live in the United States. *See id.* at 11. Although debate continues over the precise percentages, there is a general consensus that this is the approximate distribution. Indeed, these numbers were confirmed by the recent report of independent researchers from Brandeis University. *See* Jewish Elderly Nazi Victims: A Synthesis of Comparative Information on Hardship and Need in the United States, Israel, and the Former Soviet Union (January 20, 2004) (Report prepared for the JDC) (hereafter "Brandeis Report"). The Brandeis Report was an effort to compare the communities of Jewish survivors in the United States, Israel and the FSU in terms of size, and in terms of need. It relied on prior surveys of the Nazi victim population in each region, and documented only one survey that deviated from the figures provided above-a survey that used a different definition of "survivor" and found that only 13% lived in the FSU and 16% lived in the United States,

with a greater majority living in Israel. *Id.* at 21. The rest of the surveys considered by the Brandeis Report found that approximately 22%-23% of Jewish survivors of Nazi persecution live in the FSU, and 15%-17% live in the United States. *Id.* The Brandeis Report made no recommendations, but it drew many conclusions. Published ***98** several years after the Special Master filed his Plan of Allocation, the Brandeis Report confirmed the assessment of the Special Master that the population of *needy* survivors is distributed quite differently than the population of survivors. Before turning to an examination of this differential distribution, I attempt to briefly explain why it exists.

With the onset of the Cold War, survivors in the FSU were essentially cut off from the West. Since then, survivors in the United States have shared in various distributions that began with the end of the Nazi era and have continued until today, while survivors behind the Iron Curtain have received next to nothing. The Special Master exhaustively and impressively chronicled the course of Holocaust compensation in Annex E of his Plan of Allocation. Here, it suffices to restate its conclusions. Including the multiple class awards in this case, there have been ten major compensation efforts since the end of the war. The principle efforts, preceding this one, have been the Federal German Indemnification Program ("BEG Pensions"), payments by the Israeli Ministry of Finance, the Hardship Fund, the Article 2 Fund, the Central and Eastern European Fund, and the German Slave Labor Fund. *These efforts and others, together with this lawsuit, have resulted in distributions of over $53 billion to individual survivors and programs serving individual survivors.* *See* Chart on Holocaust Compensation prepared by Special Master in consultation with the Claims Conference and other available sources (Draft, dated March 5, 2004). *Of this, approximately $14.8 billion, or just shy of 28% of all restitution funds has gone to survivors in the United States. Id. Comparatively,*

just under $444 million, or 0.8% of all restitution funds has gone to survivors in the FSU. Id.

The primary reason for this imbalance is Germany's decades-long refusal to negotiate with those behind the Iron Curtain. In the BEG Pension distributions, which have for decades provided hundreds of thousands of survivors worldwide with monthly pensions, Germany excluded "all the survivors of Eastern Europe who did not emigrate to a non-Communist country." Plan of Allocation, Annex E, at 35. It did the same with the Article 2 Fund and with the Hardship Fund. In 1998, almost a decade after the end of the Cold War, Germany took a *small* step to rectify the imbalance by instituting the Central and Eastern European Fund ("CEEF").

The CEEF was set up "to compensate directly, for the first time, Holocaust victims who still remain in the former Soviet Union and Central and Eastern Europe." Plan of Allocation, Annex E, at 55. But this program was woefully inadequate. It defines "survivor" restrictively, thus continuing to ignore many victims of Nazi persecution who have never been compensated for their suffering with even a dime. To qualify for payments, a survivor must show that he or she was "confined or restricted" for at least six months in a concentration camp, prison camp, or forced labor battalion, or "confined or restricted" for at least 18 months in a ghetto, hiding in inhuman conditions, or as a child living under a false identity. *See id.* at 49-50. Jews who survived five months in a concentration camp do not qualify for payments. Nor do the many Jews who fled their homes as the Nazis approached, losing property of incalculable value. In 1999, before the distribution of settlement funds from this case had begun, Dovid Katz, a Professor of Yiddish language, literature and culture at the University of Vilnius in Lithuania, movingly explained the situation for these poor survivors:

> ***99** The last elderly Jews of Eastern Europe, whose lives were ruined by the Holocaust, and who choose to live out their days in the towns of their ancestors, are

> suffering acutely from malnutrition, poverty and lack of medicine, while the millions (or billions) from Germany, Switzerland and the great American Jewish organizations pass them by.

Dovid Katz, *How to Help the Holocaust's Last Victims,* The Forward, September 24, 1999 (cited in Plan of Allocation, at 124).

Survivors in the FSU also had to suffer through decades of Communism. This is why they are often referred to as "double victims." Stuart Eizenstat, the former Deputy Secretary of the Treasury who was instrumental in the efforts of the United States to bring about Holocaust restitution agreements, explained that he coined the term "double victims" after coming "face-to-face with the Holocaust survivor community of Eastern Europe." Stuart E. Eizenstat, Imperfect Justice, at 28 (2003). The individuals "had lived through both the Nazi massacre and the Communist repression that followed," and their faces reflected "the brutality of our time." *Id.* As brutal as life was under Communism, however, the situation for many elderly pensioners has become even worse with its collapse. *See* Plan of Allocation, Annex F ("Social Safety Nets"), at 2. "It is well known, for example, that the personal savings of many individuals in the FSU were wiped out by hyperinflation after the collapse of the Soviet Union." Brandeis Report, at 42. As a result, approximately 60% of all elderly now living in the FSU are impoverished, and the situation for survivors is particularly bad. Plan of Allocation, Annex F, at 2.

The survivor community in the FSU is currently served by a network of 177 Hesed service centers developed by the American Jewish Joint Distribution Committee ("JDC") beginning in 1992. Hesed is a Hebrew word meaning "acts of loving kindness," and these centers have lived up to their name. By 2001, the centers provided assistance to over 225,000 needy elderly Jews, approximately 135,000 of whom are Nazi victims. Because of their experience in serving this

community, I have relied on the JDC, and in turn, these Hesed centers, to effectively distribute funds from the Looted Assets Class to survivors in the FSU. The centers provide hunger relief programs, home care, winter relief, and basic medical services. They have also been able to collect detailed information about the FSU's survivor population and provide accurate assessments of the community's level of need. Not surprisingly, the researchers preparing the Brandeis Report relied heavily on the Hesed network's database of each person assisted, including 135,000 registered survivors, in developing a comprehensive comparison of survivors' levels of need in the United States, Israel, and the FSU. *See* Brandeis Report, at 22-24. Put simply, survivors in the FSU are barely surviving.

The Brandeis Report recognizes that the 135,000 survivors served by Hesed centers are "by definition impoverished," and begins to explain how this destitution compares to the experience of survivors in the United States. Brandeis Report, at 39. For information on survivors in the United States, the Brandeis Report draws primarily on the National Jewish Population Survey (NJPS), one of the surveys that Mr. Dubbin now claims support his request for reconsideration of my decision denying his motion. *See id.* at 26-29; Request for Rehearing or Clarification of Court's November 17, 2003 Memorandum and Order, filed December 2, 2003. The NJPS was administered by the United Jewish Communities in 2000-2001 via telephone to approximately 4,500 Jews living ***100** in the United States. *See* United Jewish Communities Report, Nazi Victims Now Residing in the United States: Findings from the National Jewish Population Survey 2000-01, Draft, dated December 18, 2003 (hereafter "NJPS Draft, dated December 18, 2003"). The survey included over 300 questions on a range of topics, including questions designed to ascertain whether a person was a Nazi victim. Of the 4,500 people surveyed, 146 were identified as Nazi victims. Thus, the information gleaned from the NJPS regarding the condition of survivors living in the United States

(which it estimated to be a population of approximately 122,000) is based on questions posed to these 146 individuals. The Brandeis Report, "[f]aced with the task of describing the characteristics and the living conditions of the Jewish Nazi victim population in the USA," turned to other surveys to flesh out the conclusions of the NJPS. Brandeis Report, at 26. But because the other surveys often involved extremely small samples, the researchers were "forced to rely primarily on the NJPS even though it, too, is based on a small sample." *Id.* at 29. Despite the lack of better data describing the plight of the United States survivor population, the researchers were able to draw informative comparisons and conclusions.

The survivor community in the FSU constitutes between 32% and 40% of the total Jewish population in the FSU. Brandeis Report, at 36. The survivor community in the United States, on the other hand, makes up only 2.5% of the Jewish population. *Id.* While at first blush this statistic may appear insignificant, the Brandeis Report correctly points out that "[t]he high percentages [of survivors] in the FSU mean that there is a comparatively small Jewish community available to support victims." *Id.* This problem is exacerbated by the fact that while 56% of survivors in the United States are married and 96% have children, only 41% of survivors in the FSU are married and only 44% have children. *Id.* In sum, family and community support networks are stretched thin in the FSU.

The absence of a support network, in conjunction with the lack of prior restitution and a host of other factors, has resulted in a financial situation of individual survivors in the FSU that is woeful in comparison to that of survivors in the United States. In 2000, the JDC explained the problem as follows:

> The fall of the Soviet Union struck the final blow to the economies and weak welfare systems of the successor states to the Soviet Union.... Jewish older persons are among those most affected by the economic decline.

> Governments do not have the capacity to maintain social safety nets to meet this population's needs. For example, prior to the ruble crisis in the summer of 1998, average pensions were as low as $9 per month in the Asian republics and $55 per month in Russia. By all accounts, these were extremely small amounts upon which to survive. Furthermore, in many cases, the governments had fallen behind in making these meager payments. The new crisis eroded the value of pensions even further and delayed payment of pensions, resulting in increasing hardships. Average pensions now do not exceed $20 [to $30] in any of the countries of the former Soviet Union. Indeed, most pensions are considerably less.
>
> The social and health care situation similarly reflects this deterioration. Lack of even the most basic supplies in hospitals is common. Patients must bring their own supplies, including medicine, bedding, and food in order to receive care. In addition, the overwhelming demand for services far exceeds the current governmental***101** capabilities. Services, moreover, are usually no longer provided for free and are often too expensive for an older person receiving a pension. These changes are reflected in the low ratings received by the countries of the FSU on the United Nations' Human Development Index. Out of 174 countries, Ukraine, for example, is ranked 102nd and Georgia 108th. Ukraine fell from 80th in 1995. This puts them in league with poor, developing nations.

Plan of Allocation, Annex F, at 4-5 (quoting *2000 Worldwide Program,* The American Jewish Joint Distribution Committee, Inc., at 66).

The circumstances have not changed since the Special Master filed his Plan of Allocation. Rather, they continue to confirm the recommendations of the Special Master. In January, 2004, the President of the United Jewish Communi-

ties traveled to the FSU to see firsthand the conditions of the Jewish community. He wrote:

> I have seen severe non-Jewish poverty in my travels, but I had never seen Jewish poverty like this before. After visiting Jewish families living in small two room shacks, sheltering seven to eight people each and heated with coal stoves, I found myself profoundly grateful that we as Jews, through our federations and JDC, have a way to help. Like many of you who have visited the FSU, I had often visited more familiar scenes of shut-ins-older people who are assisted by our hunger relief programs. But here in Kharkov, the total poverty picture was striking, and the thought that we might lessen our efforts and allocations, well its just unacceptable.

Letter from Steven Schwager to Special Master Judah Gribetz, dated March 4, 2004 (enclosing e-mail from Stephen H. Hoffman, dated January 23, 2004). Dr. Spencer Foreman, the President of Montefiore Hospital and a member of the Board of Directors of the JDC, wrote the Special Master to the same effect after his annual field visit to the FSU. Specifically, he again confirmed that the issue of medical care is a particular problem.

> Diagnostic testing, specialties services and all but the most urgent hospital care are unavailable to those unable to pay for them, a group that includes virtually all of the Jewish elderly, and even when admitted to a hospital as an emergency out of pocket payment must be made for pharmaceuticals and medical equipment used during the hospitalization! Prescription medications are either unavailable or unaffordable for the average pensioner. Effective care is further strictured by the primitiveness of hospital and polyclinic facilities and by the scarcity of medical equipment, even the most basic items. While limited hospital care is available for trauma and acute medical problems, elderly patients with serious condi-

> tions such as stroke are often just sent home to linger bedridden or to die. A patient with a fractured hip, who in the West would be treated with a surgically inserted hip prosthesis and sent home in three days, is treated with traction for weeks then sent home, often with a non-union of the fracture, never to walk again. With the exception of a few major centers in Moscow and St. Petersburg and selected places available only to those who can pay, the services most people receive are at best comparable to those available in the U.S. in the 1950s, and they are in striking contrast to the high-quality care and advanced technologies to which elderly patients in the U.S. and Israel have access on a routine basis and for which, with a few exceptions, governmental or private payment is available.

***102** Letter from Spencer Foreman to Special Master Judah Gribetz, dated January 15, 2004.

The International Organization for Migration, which oversees the distribution of Swiss Bank settlement funds to Roma, Jehovah's Witness, homosexual and disabled victims of Nazi persecution-and which has already distributed $6 million to over 50,000 needy survivors, especially Roma, *see* Special Master's Interim Plan, at 102-also reported on the current situation in the region:

> Eastern and Central Europe is a region where many persons, regardless of age or ethnic[ity], now endure daily living conditions which have worsened considerably since the end of communism. The elderly, and persons 'living on the edge' such as the Roma, have been hardest hit by the universal collapse of state services which once sought, however imperfectly, to meet some of their most basic material, social and medical needs.

Letter from Delbert H. Field, Jr., to Judge Korman, dated December 4, 2003. In other words, the "poverty [that] is nearly universal within these victim populations," Brandeis Report, at 44, is almost beyond comprehension.

The economic plight of survivors in the FSU is further revealed by examining the impact of the settlement funds already allocated to the Hesed network through the JDC. The settlement of this case, and in particular the allocation of funds from the Looted Assets Class, has been of tremendous aid. Contrary to Mr. Dubbin's unsupported and absurd suggestions that the Hesed centers did not need additional funding because "no such funds had been requested," *see* HSF Response, at 4, the settlement funds have in some sense saved the Hesed network. As private and international grants expired, funding to the Hesed centers was disappearing. *See* The American Jewish Joint Distribution Committee, Report on the First Eighteen Months of Welfare Programs in the Former Soviet Union, submitted to Judge Korman, July 31, 2003, at 7 (hereafter "JDC Interim Report"). The settlement funds "helped meet the shortfall." *Id.* The funds are allocated in such a way that spending is to be spread out over a ten-year period to insure that survivors will continue to receive support for the remainder of their projected life span, and in each year the money has gone a long way.

In the first 18 months after distribution began, 55% of the JDC's settlement funds budget of $10.875 million was spent on hunger relief programs, "a recognition that the relief of starvation and hunger is the core life sustaining program that Hesed programs must provide and remains the service needed by the most Nazi victims in the FSU." *Id.* at 13. As the Special Master wrote in his Interim Report, "[f]or these Nazi victims, funds from the Swiss Banks Settlement for many people have meant the difference between subsistence and hunger." Special Master's Interim Report, at 88. Specifically, the Hesed network used the money to provide food packages to 40,352 needy survivors and to serve over 2.2 million hot meals to 5,558 needy survivors. The food packages, which consist of non-perishable staples such as flour, pasta, rice, beans, sugar, oil and a protein source such as canned fish, are

intended to be given to survivors eight times per year. JDC Interim Report, at 14. Because of a lack of funds, many survivors only received them on Rosh Hashanah and Passover. The hot meals were served only once a day, an average of four times per week, also because of a lack of funds. *Id.* at 16. Indeed, although hunger relief programs have been at the heart of the JDC's relief efforts and have by all accounts been a great help, these programs***103** have still only benefitted 40% of the survivors served by the Hesed network. Approximately 60% of survivors identified as impoverished in the FSU have received no hunger relief benefit from settlement funds, despite desperate need.

Using the other 45% of its 18-month budget, the Hesed centers provided an average of four hours per week of home care assistance to 4,258 needy survivors; winter relief packages to 3,688 needy survivors; medical services to 19,118 needy survivors; and emergency grants worth approximately $50 each to 60,359 needy survivors. *See* JDC Interim Report, at 9, 19. These programs, like the hunger relief efforts, have been targeted at providing people with the barest necessities. The winter relief packages include basics such as fuel, blankets, and coats. And the home care assistance-which for these survivors is not available from any other source-is even more revealing. When Hesed workers visit survivors' homes they can assist in anything from meal preparation and supervision of medications to pumping well water and chopping wood. *Id.* at 18, 20. Without these services, which have only been made possible by the allocation of settlement funds, many in the FSU would not be able to survive the winter. But again, because of still limited funds, only a small fraction of the needy survivors served by the Hesed network (all 135,000 of whom are in desperate need) have received such a benefit.

While the overall level of destitution is explained by the statistics, examples may paint a clearer picture of the degree of suffering experienced by survivors in the FSU.

Rosa Zaitseva was 26 and pregnant when the Nazis first arrested her. Between 1941, when she attempted to flee Kiev ahead of advancing German forces, and 1944, when she was liberated by the Soviets, Zaitseva hid with her husband's relatives, languished in a ghetto, and fled to the forest, where soldiers shot at her from the trees. Her husband joined the partisans and disappeared, she gave birth to their daughter in a barn, and briefly changed her name to Nina to sound less Jewish.

After the war, she returned to Kiev to find her apartment destroyed, and married a cousin who was injured during the war and died in 1968. Their only son died 17 years ago, and Zaitseva's daughter, who lives in Russia, has been ill since birth.

Today, Zaitseva, 88, lives alone on the sixth floor of a rickety, Soviet-era building with pitch black elevators and unkempt hallways. Her pension is $30 per month. She is not recognized by the German government as a Holocaust survivor; in August 2000, the [Claims Conference, applying rules imposed by Germany,] turned down her request for assistance because she hadn't been imprisoned for at least six months in a concentration camp, prison camp, or forced labor battalion, and didn't spend at least 18 months in a ghetto, in hiding, or as a child under a false identity.

Zaitseva, it seems, had fallen through the cracks.

Melissa Radler, *Acts of Kindness,* Jerusalem Post, October 19, 2003. Rena Zaitseva is not alone.

Take Meirke Stoler, now 87, of Radin (Soviet-occupied Poland at the time of the Nazi invasion of 1941, now in Belarus). He was incarcerated ... in the ghetto there, until May 10, 1942, when some 2,000 Jews, including his wife, his child and his mother were shot and buried in a big pit at the old Jewish cemetery. Mr. Stoler, then a blacksmith, was one of 50 young Jews

taken at dawn to dig the pit. He escaped by hitting his ***104** German guard over the head with a shovel and running into the forest.....

[In 1999], Mr. Stoler had to send away the annual truckload of fuel to heat his wooden house over the winter, because it is now too expensive for him. His monthly pension comes to around $24 at the going rate. Things have gotten a lot worse since last year's collapse of the ruble in neighboring Russia, and like everyone else in these parts, his life's savings became worthless overnight back in 1991, when the USSR collapsed.

Mr. Stoler had no idea that Holocaust compensation has become a hot topic in the West. He never received a penny in compensation and reacted with his usual jovial smile, in deep local Yiddish: "what am I going to do, find a big international lawyer here in Radin, ah?"

Dovid Katz, *How to Help the Holocaust's Last Victims,* The Forward, September 24, 1999 (cited in Plan of Allocation, at 124). These are just two of the 135,000 impoverished survivors, the overwhelming majority of whom have not benefitted from Germany's reparation plans (including the CEEF, which specifically targets a narrowly defined group of victims in the FSU), but who now might be saved from the brink of starvation and death by the Hesed network. Not all were reached in time.

In 1943, [Yudel Nitzberg] and his family were deported from the local ghetto [in the FSU] to Auschwitz, where his father, mother, sister and brother were cremated alive. 'I always wear short sleeves,' he explained, pointing to the tattooed number 98987 on his arm, 'to make sure I never forget them for a minute. For better or worse, I have chosen to live and die right here, where my family lived for hundreds of years.' When asked what he needed to live well, his eyes lit up. The answer came without hesitation. 'We pensioners need an income of 100 American dollars per month per

> family. With that, we could live like Rothschild!' ... Nitzberg won't benefit from any such program. He died last year. Neighbors report that he was no longer able to afford the medicine that kept him going.

Id.

Serving these needy survivors has cost money, and will continue to cost money. Stuart Eizenstat correctly summarized the situation in reference to this case as follows:

> You have previously allocated 75 percent of looted asset money in the Swiss settlement (initially $100 million, increased by an initial interest amount of $45 million and then a second tranche of interest of $60 million, for a total of some $205 million) to victims in the former Soviet Union ... This has permitted the critically important distribution of food packages to some 135,000 survivors [actually only 40,000] in need in the CEE/FSU who have registered with the Hesed program of the American Joint Distribution Committee. **Nothing should be done to diminish this important program.**

Letter from Stuart E. Eizenstat to Judge **Korman** and Special Master Judah Gribetz, dated December 30, 2003 (emphasis added).

While the economic plight of survivors in the United States is less well documented, it is also clearly less pressing. Again, the best documentation we have for the economic position of United States survivors is the Brandeis Report, which consolidated findings from various studies. As support for his request for reconsideration, Mr. Dubbin, however, relies primarily on two of the principal surveys that informed the Brandeis Report's assessment of need in the United States. First is the NJPS, and ***105** second is a study commissioned in 2002 to assess the level of need among survivors in the New York area, entitled "Nazi Victims in the New York Area." *See* Ukeles Associates, Special Report, Nazi Victims in the New York Area: Selected Topics, November 2003

(hereafter, "Ukeles New York Report"). I turn first to the NJPS.

The NJPS estimated that of approximately 122,000 survivors living in the United States, 53,200 live in households making less than $35,000 per year. It also estimated that 29,700 survivors (or nearly a quarter of United States survivors) are living in households that fall below the federal poverty line, which is an annual income of approximately $9,000 for a single person household, $12,000 for a two-person household, and $15,000 for a three-person household. *See* NJPS Draft, dated December 18, 2003, at 13; Poverty Thresholds, available at *www.census.gov*. Again, the NJPS figures are based on a telephone survey where 146 survivors were requested to tell a complete stranger their income over the phone. Under these circumstances, a more trustworthy and revealing finding almost certainly came in response to the question: How would you evaluate your household's financial situation? Of the survivors who responded to the NJPS questions, under 2% (or an estimated 2,100 survivors out of the entire survivor population in the United States) reported that they "can't make ends meet." NJPS Draft, dated December 18, 2003, at 13. Another 35% of those surveyed stated that they were "just managing," and 63% responded that they were either "comfortable," "very comfortable," or "wealthy." *Id.*

Part of the reason that all but a fraction of United States survivors who are ostensibly below or near the poverty line respond that they can make ends meet is that they have a social safety net on which to fall back. The researchers who prepared the Brandeis report "learned repeatedly that the lack of an adequate and effective social safety net in the FSU countries results in extreme hardship among Nazi victims." Brandeis Report, at 41. In the United States, however, should survivors find themselves in need, they can rely on the guarantees that living in America provides them. *See gener-*

ally Plan of Allocation, Annex F. The Special Master explained:

> In the United States, government entitlements generally assure a minimum income provided through the Social Security Administration. There also is an adequate level of health care provided through Medicare, a program designed to aid the elderly, and Medicaid, which supplements Medicare for needy elderly persons. These programs are intended to ensure that the majority of elderly residents maintain a sustainable, although hardly lavish, standard of living.

Id. at 8-9. Or, as the Brandeis Report concluded, while there is poverty among United States survivors, "[t]he undeniable fact ... is that the public and private social and economic protection systems to assist these groups and the normal process of adjustment reflecting the immigrant experience serve as buffers." Brandeis Report, at 46. Indeed, Joe Sachs, one of the founding members of HSF-USA and formerly Chairman of its Board of Directors, acknowledged that because of these buffers, poverty among United States survivors is less dire than Mr. Dubbin may claim. This is why he wrote: "As a Survivor and Board member of the Jewish Community Services of South Florida I am unable and unwilling to tolerate the inflated numbers of poverty stricken bandied about in the press." Letter from Israel J. Sachs to Judge Korman, dated January 15, 2004 (internal brackets omitted).

In 2000, according to the NJPS, 93% of survivors in the United States received ***106** Social Security payments, including 99% of all survivors who immigrated before 1965 and 84% of all survivors who immigrated after 1965. NJPS Draft, dated December 18, 2003, at 9. The average monthly Social Security payment that year was $749 for an elderly widow living alone and $1,348 for a retired couple. *See* Plan of Allocation, Annex F, at 9. Medicaid is often paid to survivors on top of this sum, and it is significant. For example, New York state, where half of all United States survivors live,

paid approximately $29.2 billion for Medicaid in 2002. *See* New York State Department of Health, statistics, available at *www.health.state.ny.us*. The average amount awarded to each beneficiary was over $13,080, and it often included home health care. *Id.* Indeed, over 75,000 individuals in New York received Medicaid assistance for home health services, and another 105,000 received assistance with transportation in 2000. *Id.* Notably, these Medicaid payments, along with non-cash benefits such as food stamps and housing subsidies, are not considered when measuring a family's income for determining whether they fall below the United States poverty line. *See* United States Census Bureau, How the Census Measures Poverty, available at *www.census.gov*.

Mr. Dubbin also argues that the Ukeles Associates' report on survivors in the New York area vindicates his objections because it bolsters the NJPS's conclusion that a large number of survivors in the United States are poor. In preparing the Ukeles Report, over 4,500 interviews were conducted with individuals in the New York area, revealing 412 Nazi victims. Ukeles New York Report, at 2. From this, the researchers estimated that over 55,000 Jewish Nazi victims live in the New York area, and that half live in households with incomes below 150% of the federal poverty line. *Id.* at 3, 5.

While the Ukeles study paints a distressing picture of Nazi victims in New York, one must bear in mind that these survivors have available an exceptionally strong social safety net that will generally prevent the kind of destitution faced by almost all of the survivors in the FSU. Because of this social safety net, the federal poverty line is simply not the correct measurement of whether a survivor can or cannot make ends meet. Indeed, this is why the NJPS estimate that only 2,100 survivors in the entire United States cannot make ends meet seems consistent with the Ukeles study. Again, I do not wish to make light of the need in the United States survivor community, but the need faced here is of a different kind than that faced by survivors in the FSU. A recent article in the Jewish

Week that describes the plight of survivors who immigrate to the United States from the FSU highlights this fact, notwithstanding that the article was apparently intended to emphasize the economic difficulties faced by survivors. *See* Walter Ruby, *Victims Twice Over,* The Jewish Week, 1 (February 27, 2004). One of the survivors it focused on is named Faina Zaslavskaya:

> She and her husband live in Section 8 [subsidized] housing in Seagate, Brooklyn, not far from her children and grandchildren. Zaslavskaya says she and her husband receive a combined income from SSI of $950 a month-adequate for their modest needs because, unlike ex-Soviet refugees who arrived after them, they receive Section 8 assistance from the U.S. government that limits the amount of rent money they must pay to $180 a month. "Certainly we are grateful for the help we get, which affords us a better lifestyle than we would have in Russia." Zaslavskaya says. "Still, it hurts that many Americans think we take advantage of the system. They say things like, 'Look, ***107** that woman is wearing a fur coat and gets food stamps,' not realizing that she brought the coat from Russia and it is likely the only one she has. They don't understand how difficult it is for us."

Id. at 16. Another of the survivors it focused on was a man named Felix Straschnov, "an evacuee who endured typhus and starvation in Kazakhstan during the war" and fought for the Soviet army. *Id.*

> Today, Straschnov lives in Brooklyn and is active in the American Association of Invalids and Veterans from the Former Soviet Union.... Straschnov and his wife scrape by on $950 a month in combined SSI, of which they have about $400 a month left after paying rent. 'I am grateful for what America has done for us, but it is sad that we will never be able to accumulate enough money to go back to Russia one last time to see the

> graves of our late parents,' he says. 'Many of us worry, too, that when we pass on, our wives will not have the means to provide us with a decent funeral.'

Id. And a third survivor was a woman named Fira Stukelman, who explained her plight as follows:

> Thank God none of us are hungry or homeless ... Still, life is very hard for most ex-Soviet survivors of Nazism. Those of us over 65 receive a check from SSI [Supplemental Security Insurance] for $651 a month, but how does a person make do on such an amount when the rent of even a studio apartment has risen to $900 a month or more? Yes, many get food stamps of $100 plus a month and Medicare and Medicaid, which helps a lot. Still, it is very sad people who endured such terrible things in their lives still face such a daily struggle to survive in old age in wonderful America.

Id. at 14. Each of these survivors almost certainly lives in a household whose income falls below the federal poverty line, and each endures hardship, but each may report that he or she can make ends meet because of the various benefits provided by the social safety net. These services are wholly unavailable to survivors still in the FSU-survivors who are therefore in no position to "thank God none of [them] are hungry or homeless." On the contrary, "relief of starvation and hunger is the core life sustaining program that Hesed programs must provide and remains the service needed by the most Nazi victims in the FSU." JDC Interim Report, at 13.

3. My allocation decision

When dealing with a finite sum of money, any allocation decision must be concerned with relative needs. I was compelled with the first distribution of $100 million, and the subsequent distributions of "excess" funds of $45 million and $60 million, to give 75% of the money to the source of the greatest need-survivors living in the FSU-and 4% of the money to survivors in the United States. Mr. Dubbin claims that my decision was based on a "seat of the pants" assess-

ment by the Special Master that bears no relation to demographic data. HSF Response, at 12. Anyone who takes the time to read the Special Master's studied and comprehensive Plan of Allocation will know that this was as thoughtful and careful an allocation as could have been made. It was a concerted effort to quantify conditions that inherently resist a numerical assessment. Indeed, the fact that Mr. Dubbin calls it a standardless "seat of the pants" assessment leads me to wonder whether he has ever read the Plan of Allocation. Because of the extensive justification provided in the Plan of Allocation, I need not enter into a strict numerical debate defending the specific distribution of Looted Assets ***108** Class funds. However, because Mr. Dubbin is apparently so concerned with numerical standards, I will briefly address the debate on Mr. Dubbin's terms.

Of the Looted Assets and excess funds, I have thus far allocated to needy survivors in the FSU 18.75 times the amount I have allocated to needy survivors in the United States. If I were to assume that every needy survivor deserved the same amount of money, that would mean that there should be 18.75 times more needy survivors in the FSU than there are in the United States. There are at least that many. The JDC has clearly documented at least 135,000 survivors in the FSU who are in desperate need, more than the entire survivor population in the United States. Thus, even in Mr. Dubbin's terms, the 18.75 number would be subject to challenge only if there were more than 7,200 survivors in the United States who are in comparable distress. The empirical evidence that has been produced has not identified 7,200 such people.

Mr. Dubbin, recognizing that not all survivors at or near the poverty line are experiencing a level of distress sufficient to warrant payment, only claims to have identified 4,000 needy survivors in the United States-equating "need" with home care and related services. He claims (with no support) that up to 8,000 more will be identified through outreach. But if I rely on the NJPS Draft study, the number may be as

low as 2,100 people, as this is the estimated number of people who "can't make ends meet." NJPS Draft, dated December 18, 2003, at 13. Even if I accept the affidavits Mr. Dubbin submits in support of his argument, the number of total needy survivors in the United States may only be between 2,800 and 5,600. This estimate would be consistent with the declaration of David Paikin, Senior Vice President of the United Jewish Community of Broward County, Florida, who wrote in support of the HSF-USA proposal. *See* Motion for Immediate Distribution, at Tab 5. Mr. Paikin explained that there are between 5,000 and 10,000 survivors living in Broward County, up to 230 of whom may need additional home health care (Mr. Dubbin's apparent proxy for need in the United States). *Id.* This still represents only 2.3% to 4.6% of the survivors in Broward County, Florida, a state with one of the least extensive social safety nets in the country. Taking this level of need as representative-in fact, it is probably higher than average given the low level of public assistance provided by the state of Florida-one would expect to find between 2,800 and 5,600 survivors nationwide requiring home health care.

In sum, Mr. Dubbin has produced no evidence to undermine the percentage allocation reached by the Special Master, and adopted by me. Instead, the empirical evidence supports my decision. Notwithstanding this, I now turn directly to Mr. Dubbin's objection and proposal, as he questions not merely my identification of needy survivors, but my method of identification.

4. Mr. Dubbin's objection and proposal

Mr. Dubbin concedes that the *cy pres* allocation to the Looted Assets Class should not be distributed *pro rata* among each of the members of the Class (a class which includes all survivors and their heirs). Indeed, he apparently agrees that the money should be given to the neediest survivors. But he objects to my decision to give only 4% of the funds to needy survivors in the United States. Given the distribution of need

outlined above and described more extensively in the Special Master's Plan of Allocation, and given the total lack of contradictory demographic *109 data produced by Mr. Dubbin, this objection is frivolous.

Instead of trying to determine a way to equally distribute a finite sum of money to the neediest of *all* survivors, Mr. Dubbin's objection proceeds from the premise that geography should be the controlling factor. He argues that needy survivors in the United States should be awarded 25% of the funds because approximately 25% of survivors live in the United States. Mr. Dubbin provides no demographic support for his claim that 25% of all survivors live in the United States. This figure is inconsistent with prior surveys and Mr. Dubbin has apparently abandoned in favor of 20% in his most recent proposal for the distribution of residual funds. *See* Plan for Providing Assistance for Needy Nazi Victims in the United States Submitted by HSF-USA, dated January 30, 2004, at ¶ 27, available at *www.swissbankclaims.com.* I will not waste time addressing its veracity. The precise percentage of survivors living in the United States is irrelevant for the purpose of dealing with Mr. Dubbin's objection. Mr. Dubbin's objection is frivolous because there is no Looted Assets Class sub-class composed of United States survivors. The relevant sub-class is the Looted Assets Class itself, and it is composed of *all* victims of Nazi persecution *and* their heirs whose assets were looted by the Nazis. It is not subdivided geographically. There is no "U.S. Survivors' share." HSF Response, at 15. To the contrary, the only way survivors in the United States would be entitled to 25% of the funds from the Looted Assets Class would be if they showed that 25% of the most pressing need among Jewish survivors globally was in the United States.

Mr. Dubbin even argues that, "if the present allocation scheme is not corrected, the settlement would violate Rule 23, because it would compromise the Looted Assets claims of the U.S. Survivor community for virtually no consideration." *Id.*

at 18. He continues: "[N]o goal, not even the increase in the total settlement fund can justify a settlement that eliminates *the rights of one sub-class of plaintiffs* in order to confer a benefit on another sub-class." *Id* (emphasis added). Again, because there is no sub-class of United States survivors, this claim is baseless. The percentage of survivors who live in the United States is irrelevant for my distribution decision because all survivors are members of the same sub-class-the Looted Assets Class. There are no further divisions, by geography or otherwise. As Professor Neuborne has written: "Mr. Dubbin's effort to drive legal wedges between and among Holocaust survivors based on where they live is therefore simply wrong as a matter of law and policy." Supplemental Neuborne Declaration, at ¶ 38.

The only relevant question is what percentage of the *need* among all survivors can be found in the United States. According to demographic data set forth above, data that Mr. Dubbin has yet to refute, only a small fraction of the neediest survivors live in the United States. Mr. Dubbin would provide these relatively few needy survivors with a disproportionate benefit solely because of the overall size of the survivor community in the United States. Such an allocation is arbitrary and unreasonable. Its flaws are better understood by a detailed look at Mr. Dubbin's proposal.

Mr. Dubbin has put forth only one "concrete" proposal, first presented in connection with his objections to the Special Master's recommendation on how to distribute the first allocation of excess funds, and resubmitted now. *See* HSF Objection to Allocation of Interest; Motion for Immediate Distribution, Tab 4. The proposal, entitled***110** "Proposal for Improved Services for Holocaust Survivors in the United States," was prepared by Bert Goldberg, President of the Association of Jewish Family & Children's Agencies (AJFCA). While Mr. Dubbin continues to refer to this HSF-AJFCA Proposal, he apparently recognizes its own shortcomings. Indeed, if this proposal were ready to be implemented, there

would be no need, when calling for the "immediate distribution" of funds, for him to demand that the funds be placed "in trust to be spent in accordance with the decisions of a committee of HSF survivors," representatives of other organizations, and "the Court." Motion for Immediate Distribution, at 1 n. 1. Regardless, I consider the proposal as a part of Mr. Dubbin's objection and as evidence of its flaws.

The HSF-AJFCA proposal is riddled with vague assertions and unsupported estimates, but at core, it is a proposal that would give 25% of the funds allocated to the Looted Assets Class to, *at most,* 12,000 survivors in the United States for supplemental home health services. Mr. Goldberg claims that approximately 4,000 identified survivors are already receiving considerable but insufficient aid from Jewish human services agencies, and 8,000 more could be identified by an outreach program. He would like to provide more complete home health services to this group. To implement this proposal, Mr. Dubbin demands $30 million annually, of which he claims $10.5 million is needed for home care services for the already identified needy survivors; $3 million is needed for emergency services; $3 million is needed for transportation services; $3 million is needed for outreach; and $10.5 million is needed for services to those survivors who would be newly discovered as needy through the outreach. Motion for Immediate Distribution, Tab 4, at 7.

First, Mr. Dubbin's $30 million per year budget cannot be reconciled with the limited funds available for distribution. As explained earlier, Mr. Dubbin has demanded that out of $200 million he has proposed be reallocated to the Looted Assets Class, $50 million be set aside for "immediate distribution" to survivors in the United States. This $50 million sum is based on the premise that 25% of all survivors reside in the United States-an estimate that he has already reduced to 20%. Even if I were to grant this "immediate distribution" of $50 million it would only be sufficient to pay for less than two years of his proposal (and a still shorter span if the sum

were reduced to $40 million to correspond with the concession that closer to 20% of survivors reside in the United States). Under his proposal, there would be no money for assistance programs necessary to provide needy survivors with assistance over time. As the Special Master wrote in his Plan of Allocation: "Social services needs that appear imperative today may diminish in a few years' time, while other demands not yet anticipated-especially with an aging population-may later arise." Plan of Allocation, at 136. Indeed, this is why he advised that, "there should be a presumption that funding of these recommended social services programs will be maintained for a period of up to ten years." *Id.* Mr. Dubbin apparently sees no need for such continuity.

Second, Mr. Dubbin's identification of need is unreasonably vague. Specifically, Mr. Dubbin proposes allocating these funds to the HSF in conjunction with the AJFCA for the benefit of the approximately 4,000 survivors in the United States whom Mr. Goldberg claims have been identified as being in poor health and in need of home care and related services. *See* Motion for Immediate Distribution, Tab 4. The problem with relying on the estimate of 4,000 individuals is that by his ***111** own admission, Mr. Goldberg does not know whether they all actually need more assistance than they are already receiving. Indeed, Mr. Goldberg describes the 4,000 individuals he has "identified" as follows:

> Approximately 4,000 individuals currently receive in-home services provided either directly by the Jewish human service agency in their community or by referral and paid for by the local agency. It should be noted that, in addition to services made available by funds supplied from Jewish communal resources, home care for the elderly is provided (or not provided, depending on the state) with funds provided by Medicaid and/or Medicare. It bears note that, in some cases, these services are purchased on the 'gray market,' from non-licensed and unsupervised providers, or from agen-

> cies that are not part of the Jewish communal network. In addition, frequently, family members provide some or all of the services needed. **All of these factors make it extremely difficult to obtain a definitive estimate of the home care needs.**

Motion for Immediate Distribution, Tab 4, at 3 (emphasis added).

Thus, it seems clear that at least some number of the 4,000 identified individuals receiving home care and related services from the Jewish human services agency in their community are also receiving services from other sources. Nevertheless, this soft and speculative number becomes the basis for Mr. Goldberg's estimate of how many survivors are in need of settlement funds. Specifically, Mr. Goldberg claims that these 4,000 individuals are only "half" of the needy survivors in the United States. Mr. Dubbin then demands that I fund an outreach program through which Mr. Goldberg claims his Foundation could find 8,000 more. *Id.*, at 7. Either Mr. Goldberg is careless with his words or poor with his math, because this makes no sense. It is also irrelevant. Neither Mr. Dubbin nor Mr. Goldberg has produced any concrete evidence to substantiate the estimate that their agencies could locate 4,000 or 8,000 such survivors. Indeed, the only support for the proposed outreach program is the following conclusory statement: "Agencies further report their belief that they currently know of only half the survivors in need of services in their community." *Id.* This unsupported "belief" is hardly enough to warrant an allocation of $13.5 million annually, Mr. Dubbin's estimated cost of the outreach program and services to the newly identified survivors. While not all studies are infallible, Mr. Dubbin has yet to present a single one to substantiate his projected outreach estimates.

A more revealing estimate of the likely success of Mr. Dubbin's outreach program is provided by Mr. Paikin, who submitted a declaration in support of Mr. Dubbin's proposal, which I discussed earlier. *See* Motion for Immediate Distri-

bution, at Tab 5. To reiterate, Mr. Paikin explained that there are between 5,000 and 10,000 survivors living in Broward County and that in June 2003, 106 were receiving (not merely in need of) home health care. *Id.* He estimated that given recent trends of needy survivors coming forward, that number could increase to 230 with additional funding and outreach. *Id.* Assuming that this percentage of survivors needing home care is representative of the nationwide survivor population, between 2,800 and 5,600 survivors nationwide require home health care. Many of these survivors, of course, may be able to pay for their required services without resort to settlement funds, and many-particularly those not living in Florida-will be able to receive public assistance. Mr. Paikin's estimate, along with the surveys set out earlier, thus suggest that Mr. Goldberg, faced ***112** with what he acknowledges are "factors [that] make it extremely difficult to obtain a definitive estimate of the home care needs," has submitted a proposal based on mere guesswork-not the kind of proposal that justifies the expenditures sought.

Mr. Dubbin's objections to the assistance of desperately needy survivors in the FSU may be rooted in the apparently differential views as to survivors of the Holocaust held by those who make up HSF-USA. As I stated at the outset, comparing different populations of survivors is by definition an odious process. Some of the groups that claim to be members of HSF-USA have made the process no easier by repeatedly suggesting that the survivors living in the FSU (or by the same logic, former FSU survivors who have immigrated to Israel and the United States) are not "true survivors." For example, Leo Rechter, one of the founding members of HSF-USA and now its Secretary, wrote:

> Most Jews currently residing in the FSU never saw a Nazi uniform. As you know, by the time the Nazis invaded Russia, they used 'Einsatzgruppen' to kill most of the unfortunate Jews they captured. In the communist FSU, most of those that fled eastward were able to take

> their most precious belongings along and did not own the real-estate they left behind. The destitute elderly Jews in the FSU are victims of the ravages of WWII (like many non-Jews in the civilian population) and of the failed communist economic system and they ought to get as much charitable assistance as possible. But by no stretch of the imagination can they be considered to be legitimate members of the 'Looted Assets' Class or any other Class.

Letter from Leo Rechter to Professor Neuborne, dated July 22, 2002.

I have already refuted this claim by providing Mr. Rechter with a study, entitled "Plunder of Jewish Property in the Nazi Occupied Areas of the Soviet Union," by Yitzhak Arad, a researcher on the Holocaust for the International Center for Holocaust Studies at Yad Vashem. *See* Letter from Judge Korman to Leo Rechter, dated September 23, 2002 (enclosing study, available at 29 Yad Vashem Studies 109-48 (2001)). Indeed, in proposing his recommendations for the Looted Assets Class, the Special Master explained in considerable detail that as was "true for Nazi victims across Europe, Jews in the former Soviet Union who lived in, owned property in, or fled from areas under Nazi occupation lost virtually all of their material possessions to the Third Reich's plunder, which in Eastern Europe was led by the notorious *Einsatzgruppen*, often assisted by the local population." Plan of Allocation, at 123. The "Looted Assets Class" annex to the Plan of Allocation (Annex G) made it clear that "Nazi victims' assets, and particularly those of Jews, were plundered with abandon and without precedent across all nations, all economic classes, and without regard to the ultimate fate of the victim-whether that victim was murdered in an extermination camp or work camp, or fled abroad to the East." Plan of Allocation, Annex G, at 3. The Annex provided numerous historical examples demonstrating that those living in the former Soviet Union and other Eastern European countries were no less exempt than Western

Europeans from Nazi plunder. *See id.*, at 15 (describing recent research by United States Holocaust Memorial Museum scholar Dr. Martin Dean, documenting transfer to the Reichsbank of assets from Belarus, Ukraine, Lithuania and elsewhere; Dr. Dean's research paper tellingly is entitled "Co-operation and Rivalry: Civil and Police Authorities and the Confiscation of *113 Jewish Assets in the Reich and the Occupied Soviet Territories").

Despite the Plan of Allocation and my letter enclosing the Arad study (research which was published after the Plan of Allocation was adopted), HSF-USA apparently remained unconvinced. When Mr. Dubbin initially submitted his $30 million per year proposal, he wrote, in deference to the views of the groups making up HSF-USA:

> The HSF Survivors assume for purpose of this Objection the correctness of the Special Master's conclusion that the Victims of Nazi Persecution in the Former Soviet Union [are] qualified members of the Looted Assets Class. *See, e.g.*, Special Master's Report at 23-6, and Annex G, at G-6 and G-7. The Court understands that differences of opinion exist on this question, but that they are not discussed in this request.

Objections, dated September 27, 2002, at 11 n. 11. This sort of backhanded suggestion has no place in the distribution process. Or, in the words of The Forward: "Some in the group [HSF-USA] reportedly have had the effrontery to suggest that Holocaust survivors in the former Soviet Union aren't necessarily Holocaust survivors, since many avoided the Nazis by fleeing to Siberia. That's outrageous." Editorial, *Justice Delayed, Peevishly*, The Forward, September 13, 2002. All who suffered and lost assets are equal members of the Looted Assets Class. The only difference relevant to the distribution process is their current level of need.

Mr. Dubbin's hesitation in acknowledging that survivors in the FSU are true survivors is also inconsistent with his current position and raises serious questions regarding the claim

of HSF-USA that it represents all needy survivors in the United States. The overwhelming majority of the most needy survivors in the United States are recent immigrants from the FSU. And Mr. Dubbin must surely recognize that the survivors still in the FSU are the same as the survivors who he inevitably embraces as "true survivors" once they immigrate to the United States and who, by consistently being among the neediest survivors in America, bolster his claim that the survivor community in the United States is in desperate need. Indeed, as the Brandeis Report concluded, in "the United States, poverty rates are especially noteworthy among recent immigrant victims from the FSU." Brandeis Report, at 44. Or in the words of the Ukeles study, "Nazi victims in Russian-speaking households are much more likely to be poor [81% as compared to 21%] than Nazi victims in non-Russian-speaking households." Ukeles New York Study, at 6. This is not because individuals living in Russian-speaking households cannot succeed in New York; it is because 67% of those in Russian-speaking households have arrived in the United States since 1990. *Id. Essentially, the fact of being a recent immigrant from the FSU is the best predictor of poverty for survivors in the United States.*

Finally, Mr. Dubbin makes two more outlandish claims on this score that warrant additional comment. First, Mr. Dubbin has argued that the allocation formula I have employed thus far "constitutes, in the eyes of the American Survivor community, a de facto exercise of charity using their money." Letter from Samuel Dubbin to Judge Korman, dated October 29, 2002, at 4. Setting aside the fact that, as I explained earlier, the money is not "their money," Mr. Dubbin must recognize that this objection is inconsistent with his own proposal. Mr. Dubbin would take money that he claims belongs to the American Survivor community and give it to *at most* 12,000 individuals, or less than 10% of its estimated 122,000 members. Indeed, although the number of survivors in the *114 United States living below the poverty level has been esti-

mated at 30,000, the overwhelming majority of them would not benefit from Mr. Dubbin's proposal. It is hard to see how this proposal would survive Mr. Dubbin's own objection to the Special Master's Plan of Allocation as coercing charity.

Second, Mr. Dubbin argues that "had the Special Master's Initial Allocation Plan [to give United States survivors only 4% of the money] been published *prior to* the time the Class members had an opportunity to opt out, there would have been a massive opt out by Looted Assets Class members from the United States-over 100,000 members of the Settlement Class," which he maintains "would undoubtedly have threatened if not destroyed the settlement itself, as the Swiss Banks would likely not have tolerated the exodus of one-fifth of the settlement class despite the supposed 'weakness' of the looted assets claims." HSF Response, at 19-20.

The "mass opt-out" argument, like the "charity" argument, could apply with equal-or greater-force to Mr. Dubbin's proposed plan of allocation, a plan that would exclude 90% of the survivors in the United States from any share in the *cy pres* distribution to the Looted Assets Class. The basic fact is that each of the legal objections Mr. Dubbin makes to the Special Master's plan of allocation applies equally to his own proposal, because both plans accept the premise that the limited funds available for distribution should go to the neediest members of the Class. This premise is legally sound and morally justified. Mr. Dubbin's proposed application of it is not.

More significantly, Mr. Dubbin's "mass opt-out" claim ignores the fact that the United States survivor members of the Looted Assets Class are very often members of each of the other sub-classes as well (except for the relatively small Slave Labor II Class). The benefits directly paid to over 151,000 Jewish survivors worldwide (or, in the case of bank accounts, heirs) from these three *other* classes-Deposited Assets, Slave Labor Class I and Refugees-total over $358 million to date. Nearly 37,000 survivors living in the United

States have received over $107 million of that sum. In other words, U.S. survivors have received approximately 29.9% of all settlement funds distributed to date. Had they opted out and pursued the novel legal theories underlying the case on an individual basis, they likely would have received nothing.

By contrast, the desperately poor survivors in the FSU, who lack the bare necessities of life and who were victims of Nazi persecution, receive next to nothing from their membership in the Deposited Assets Class, Slave Labor I Class or Refugee Class. They were living under communism and most did not have access to Swiss Banks, most did not seek refuge in Switzerland, and many were not Slave Laborers. Even though they suffered terribly as a consequence of the Nazi onslaught and lost whatever they had, the only significant benefit they receive from the Settlement Agreement is from the *cy pres* allocation for members of the Looted Assets Class. One could easily argue that without such an allocation, they would have had much more of an incentive to opt-out than survivors in the United States. Mr. Dubbin apparently overlooked this fact (along with seemingly all of the other facts relating to the survivors in the FSU) when making his argument.

Mr. Dubbin has written: "If continued into the future at [the current allocation formula] with an additional $500 million likely to come available, the FSU would receive a total of $528 million, Israel would receive a total of $87.5 million, and the *115 U.S. would receive $28.3 million for the needs of Survivors here. Though such an outcome seems fantastical, the U.S. Survivors have seen nothing in this case to suggest it is not a distinct possibility." HSF Response, at 11 n. 8. I do not address here the issue of how future funds will be distributed. This is partly because I specifically gave the public the opportunity to submit sound, *concrete* proposals to guide my decision. First the Special Master will review the proposals and make a recommendation. Then I will hold a hearing and make a decision. If, after reviewing the many

proposals submitted, the "fantastical" outcome that Mr. Dubbin fears proves to be how the needs of the class are best satisfied, there would be nothing fantastic about it. It would be an honest and tragic reflection of current levels of need.

Part II: The Standing of HSF-USA to object

I turn now to the question of whether HSF-USA even has standing to bring these objections. HSF-USA relies on the principle that a membership corporation has standing to litigate on behalf of its members. While HSF-USA does not number any needy victims of Nazi persecution among its own members, it argues that some of its constituent entities have such victims among their membership and that this confers standing on HSF-USA to litigate on behalf of these individuals. I have reviewed the Certificate of Incorporation of the HSF-USA and its by-laws. My reading of these documents suggests that HSF-USA is not a membership corporation even though Article 4 of the Certificate provides that "[t]he Corporation may have members if the Board of Directors determines that it would be in the best interest of the Corporation to do so." The Bylaws of HSF-USA state in relevant part: "The Corporation should have a special class of members referred to as 'Founding Members.' The Founding Members should consist of the initial Board of Directors of the Corporation, and Thomas Weiss, M.D."

While the Memorandum of Law submitted by HSF-USA alleges that it is "comprised of Survivors and Survivor groups that are membership organizations which function in many capacities for Survivors today," Response of Holocaust Survivors Foundation-USA, Inc. on Standing Issues at 3 (hereafter "HSF Standing Response"), and that "there *are* a large number of Survivors who are part of HSF and its member organizations," *id.* at 6, not a single affidavit or corporate document has been submitted that establishes that any organization has been elected to membership in HSF-USA by the Board of Directors. Under these circumstances, HSF-USA cannot invoke the principal that, under certain circumstances,

"an association has standing to invoke the court's remedial powers on behalf of its members." *Hunt v. Washington State Apple Adver. Comm'n,* 432 U.S. 333, 343, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977) (quoting *Warth v. Seldin,* 422 U.S. 490, 505, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975)).

Moreover, even if some of the groups that are said to "comprise" HSF-USA had been elected to membership and might individually have standing to object on behalf of their members, HSF-USA would lack such standing. As Professor Neuborne wrote:

> I question ... whether in the circumstances of this case, Rule 23 or the prudential aspects of Article III standing authorize such a self-described umbrella organization to purport to act on behalf of unnamed individuals who are allegedly members of one or more of 50 constituent organizations, without producing any evidence that the individuals are aware of the action, and have authorized***116** its prosecution. Allowing counsel for such a self-appointed umbrella group with no members of its own to purport to assert the legal rights of alleged members of constituent organizations without producing proof that individuals with standing actually exist who wish the action to proceed virtually invites entrepreneurial lawyers to claim to represent individuals who may not exist, who have never heard of the lawyer, and who, in fact, disagree with the position asserted.
>
> Moreover, whatever the general rule concerning the role under Rule 23(e) of organizations purporting to represent categories of class members without their explicit assent, the particular circumstances of this case argue strongly against recognizing the status of HSF as a self-appointed legal proxy for unnamed members of its constituent groups. Where, as here, the interests of the alleged beneficiaries of the HSF challenge are already adequately protected by careful submissions to the Court by established organizations such as United Jewish

> Communities and New York City Federation, organizations that actually provide services to the individuals in question, I question whether it is appropriate to accept a legal challenge from such a self-designated group in the absence of explicit authorizations from the alleged individuals whom HSF claims to represent, especially when HSF is represented by an attorney who has already sought to exploit the settlement by unsuccessfully seeking unreasonably large legal fees for providing alleged services to the plaintiff-class on behalf of another client, and whose pursuit of a meritless and ultimately abandoned appeal on behalf of that client actually delayed the distribution of funds to the Looted Assets class for at least six months.

Affirmation of Burt Neuborne, dated February 20, 2004.

Finally, HSF-USA would lack standing because it cannot be presumed that any of the organizations which HSF claims as "members" would themselves have standing. I have thus far assumed, for the purpose of addressing the standing issue, the validity of the premise the Special Master used in formulating the plan of allocation-namely, that all survivors are members of the Looted Assets class. The Special Master adopted this presumption for allocation purposes because it would be impossible for any survivor to satisfy the necessary criteria for membership in the class. But as the Special Master explained in his original proposed plan of allocation:

> The Settlement Agreement indicates that only those who have asserted or may assert claims against a Releasee can claim membership in the "Looted Assets Class," i.e., that only those "Victims or Targets of Nazi Persecution" who were looted, and whose stolen property actually or allegedly was sent to or through Switzerland or Swiss entities, are entitled to participate in this Settlement.

Plan of Allocation, at 111.

As I explained in Part I above, the Special Master correctly observed that while it is well accepted by historians, including those representing Switzerland, that a primary purpose of the Nazi plunder was to transform loot (especially, but not only gold) into foreign currency by marketing these items in neutral nations, including Switzerland, determining "[w]hich particular looted item may have ended up in Switzerland ... is a far different matter." *Id.* at 114-15. "Were the Special Master to recommend that each [looted assets] claim be assessed individually ... the result would be an unwieldy ***117** and enormously expensive apparatus to adjudicate hundreds of thousands of claims, for losses which can barely be measured and hardly documented, *and whose connection to Switzerland, or a Swiss entity, if it ever existed, probably no longer can be proven.*" *Id.* at 115 (emphasis added).

While these and other considerations led the Special Master to treat all survivors as Looted Assets Class members for the purpose of devising a rational plan of allocation, it does not follow that every survivor should be treated as a member of the Looted Assets Class for all purposes. Simply stated, a survivor who seeks to assert objections to the Special Master's Plan of Allocation must still show that he or she has standing as a result of a direct injury that brings him or her within the true definition of the Looted Assets Class. Of course, the same showing must be made by a membership corporation seeking to litigate on behalf of such a survivor.

In sum, I find the HSF-USA has no standing in this case. Nevertheless, I would not lightly ignore objections that have compelling merit, even if made by an *amicus curiae.* The HSF-USA objections have no merit.

Part III: Mr. Dubbin's Fee

Finally, because I have ruled on Mr. Dubbin's various proposals, motions and objections, it is appropriate here to dispose of Mr. Dubbin's outstanding fee application. Two years ago, Mr. Dubbin submitted a fee application that was almost equal to the total amount of legal fees awarded to

those counsel who were compensated for their role in obtaining the $1.25 billion settlement with the Swiss banks. Specifically, Mr. Dubbin requested $3.6 million in fees and compensation for himself and an additional award of $2,315,250 for Dr. Thomas Weiss, a founding member of HSF-USA. *See* Verified Motion for Attorney's Fees and Expenses, dated March 15, 2002 (hereafter "Motion for Mr. Dubbin's Fees"); Declaration of Thomas Weiss, M.D., dated May 16, 2002. Mr. Dubbin also sought expenses in the amount of $70,260.87. *Id.* Of the total $5.9 million that Mr. Dubbin seeks, approximately $3 million is for his efforts on behalf of HSF-USA and its predecessor, the South Florida Holocaust Survivors Coalition, with respect to his objective described in the earlier parts of this opinion-namely, his effort to rectify the allegedly disproportionate sum allocated to survivors in the United States. The remaining $2.9 million, of which Mr. Dubbin seeks $600,000 for himself and $2.3 million for Dr. Weiss, who was Mr. Dubbin's client, is for services rendered in connection with Dr. Weiss's objection to the releases granted to Swiss insurance carriers as part of the global settlement of all claims against Swiss business entities. I will address the latter request for counsel fees in a separate opinion, to follow shortly. Here, I reject outright Mr. Dubbin's request for $3 million as it relates to the subject matter of this opinion.

I begin by observing that this fee request is for services rendered as of March 15, 2002-before the submission of the various proposals, objections and motions discussed above. Because I have rejected each of Mr. Dubbin's claims, it seems obvious that since that date, he has accomplished nothing in relation to his efforts to correct the supposed imbalance in the allocation of funds to the Looted Assets Class. This allows me to briefly deal with Mr. Dubbin's $3 million fee request for his work prior to the filing of his fee application.

I read carefully Mr. Dubbin's affidavit in support of his fee application. While I am prepared to accept for present

purposes that he may have expended time and effort ***118** to obtain assistance from various sources for his clients, the Settlement Fund was not set up to pay legal or other expenses of survivor groups. If Mr. Dubbin is entitled to compensation from the common fund, it must be for benefits conferred on members of the Looted Assets Class, and more specifically, benefits associated with his professed goal of achieving a different distribution of funds allocated to the Looted Assets Class. After all, "[t]hose who receive no benefit from the lawyer's work should not be required to pay for it." *Van Gemert v. Boeing, Co.*, 573 F.2d 733, 736 (2d Cir.1978).

The following is a brief summary of what Mr. Dubbin in fact did before filing his fee application with reference to the issues discussed in this opinion. After I approved the Settlement Agreement on August 9, 2000, Mr. Dubbin filed a notice of appeal on behalf of Dr. Weiss. Prior to the filing of Dr. Weiss's notice of appeal from the judgment approving the settlement, I had a telephone conference with Dr. Weiss, Mr. Dubbin, and Professor Neuborne in which I attempted to dissuade Dr. Weiss from filing the notice of appeal. This conference is pertinent to Dr. Weiss's and Mr. Dubbin's effort to rip off an additional $2.9 million for the objections to certain releases granted to Swiss insurance carriers, which I will address in depth in a separate opinion. Now, I add only that Dr. Weiss demanded that I provide money to fund private research for a separate litigation in exchange for his not filing a notice of appeal. I refused.

Subsequently, Mr. Dubbin filed a notice of appeal on behalf of Dr. Weiss and others from my approval of the Plan of Allocation. After months of delay arising from Mr. Dubbin's difficulties in perfecting the appeals, Professor Neuborne and I met with Mr. Dubbin and Dr. Weiss. We pointed out that both appeals were without merit, but because distribution could not begin until all appeals from the order approving the Settlement Agreement were resolved, the presence of the first appeal could further delay the commencement of distribution.

Approximately one week before Mr. Dubbin's appellate brief was due, Mr. Dubbin withdrew both appeals with prejudice having never filed a brief. Nevertheless, several other appeals from my order approving the Settlement Agreement remained, and the Court of Appeals did not affirm the judgment approving the Settlement Agreement and the Plan of Allocation until July 26, 2001. *See In re Holocaust Victim Assets Litig.*, 14 Fed.Appx. 132 (2d Cir.2001).

Mr. Dubbin claims that despite the withdrawal of his appeals, his efforts created a tangible benefit to American members of the Looted Assets Class that warrants $3 million in legal fees. Specifically, he points to a two-page letter that Professor Neuborne wrote after Mr. Dubbin withdrew his appeal. Mr. Dubbin describes this letter as follows:

> The compromise of the Appeals resulted in the valuable benefit to the American Survivors of the Lead Plaintiffs' Class Counsel's commitment to support an allocation to the American Survivor community from funds remaining after the initial allocation (estimated by Professor Neuborne to be between $100 and $400 million) in their fair proportion of the world Holocaust Survivors population, and with due regard for the fact that they have not received significant allocations up to this point (less than 1%). This represents a potential additional value of between $25 million and $100 million or more....
>
> Although the Court has not ruled on any secondary distribution, the Lead Plaintiffs' Class Counsel's commitment, in a matter where the Defendants have *no* ***119** stake in how the remaining funds will be allocated, as enormous tangible value to the American Survivors, and was a direct result of the work Counsel did on their behalf up to and through the resolution of the Appeals.

Motion for Mr. Dubbin's Fees, at 62-63.

While Mr. Dubbin cites other benefits that he claims derive from Professor Neuborne's letter, *see id.* at 63-64, I can now state with certainty that those potential or intangible "benefits" amounted to nothing in terms of a direct benefit to the members of the Looted Assets Class. This is due in part to the flawed premise that needy survivors in the United States were not treated fairly, and in part to Mr. Dubbin's failure to submit a viable home and health care program or other proposal for Mr. Neuborne to support. Mr. Dubbin never undertook any serious effort to provide empirical evidence to support his claim that needy members of the Looted Assets Class who reside in the United States were being treated unfairly. In the end, he never impacted any distribution decisions. By contrast, the lawyers who sought compensation for obtaining the $1.25 billion settlement personally risked some $432,500 for litigation expenses, a substantial portion of which went toward original research that ultimately had a major impact on the success of their clients' settlement negotiations. One of these attorneys, Robert Swift, alone contributed over $100,000 to this effort. He was awarded a fee of $1.25 million. *See In re Holocaust Victim Assets Litig.*, 270 F.Supp.2d 313 (E.D.N.Y.2002). This is how class action lawyers who know what they are doing litigate, and this is how they win their fee.

In any event, I now turn to Professor Neuborne's letter, which Mr. Dubbin argues is worth $3 million in legal fees. The principal problem with this letter as the basis for Mr. Dubbin's fee application is that it only obligated Professor Neuborne to support certain proposals. It would have provided a benefit to members of the Looted Assets Class whom Mr. Dubbin claims to represent *only* if it achieved in some tangible way the objective of rectifying the alleged unfairness in the Plan of Allocation. This did not occur. Specifically, Professor Neuborne wrote:

> In connection with the [expected] secondary distribution, I have a great deal of sympathy with the argument

> that **the needs of poor survivors in the United States should be carefully considered.** I will support thoughtful plans designed to assure that the needs of the American survivor community are addressed, with resources in a fair proportion to their overall numbers, and with due regard for the fact that they have not received significant allocations up to this point. I would be delighted to support a serious, realistic plan for providing home and health care to needy survivors in the United States.

Letter from Professor Neuborne to Samuel Dubbin, Esq., dated May 15, 2001 (emphasis added). Read closely and in context, Professor Neuborne pledged to support plans designed to address the *needs* of the American survivor community in proportion to their overall numbers. Indeed, this is what he has done.

This pledge was simply a statement of Professor Neuborne's commitment to fairly represent the class as a whole, and is consistent with the policies underlying the *cy pres* distribution outlined in the Plan of Allocation. As Professor Neuborne explained, in writing to Mr. Dubbin:

> You were repeatedly informed by me and by Judge **Korman** that the letter carried absolutely no legal consequences. I accepted the anodyne language because I agreed with it. I stand by it today. In connection with any ***120** distribution of unclaimed funds, I support a careful consideration of the needs of poor survivors in the United States. I support allocations that correspond fairly to the number and plight of the poorest survivors in the United States. I support plans to provide the necessities of life to needy survivors in accordance with numbers and need.

Letter from Professor Neuborne to Samuel Dubbin, Esq., dated October 2, 2003. Under these circumstances, I cannot conclude that the May 15, 2001 letter was by itself worth between $25 million and $100 million to the Looted Assets

Class. Instead, I look at the letter in the context of this case as a whole.

The only arguably tangible benefit I recognize as resulting from Professor Neuborne's May 15, 2001 letter was Professor Neuborne's pledge to support a "serious, realistic plan for providing home and health care to needy survivors in the United States." But this pledge, of course, has not created any actual benefit to survivors due to Mr. Dubbin's continued failure to put forth such a plan. Again, the letter itself is not something worth compensation-only what benefits may have actually accrued to Mr. Dubbin's clients as a result of the letter could be worth compensation. Because of Mr. Dubbin's inaction, there have been none.

CONCLUSION

This memorandum and order sets forth the reasons for my order of November 17, 2003, adopting the Special Master's Interim Report. It also specifically serves to (1) deny Mr. Dubbin's October 9, 2002 motion for reconsideration of my September 25, 2002 order regarding the distribution of excess funds, (2) deny Mr. Dubbin's December 2, 2003 motion for rehearing on my November 17, 2003 order, and (3) deny Mr. Dubbin's March 15, 2002 motion for fees to the extent that it related to his efforts to reallocate a larger sum of money from the Looted Assets Class to survivors living in the United States.

SO ORDERED.

APPENDIX H

--- F.Supp.2d ----, 2004 WL 3710212

United States District Court,E.D. New York.

In re HOLOCAUST VICTIM ASSETS LITIGATION.

This Document Relates to: All Cases.

Nos. CV-96-4849 (ERK)(MDG), CV-99-5161, CV-97-461.

Sept. 13, 2004.

MEMORANDUM

KORMAN, Chief Judge.

*1 Several appeals from decisions I have issued in this case are currently pending before the Second Circuit, and Professor Burt Neuborne has filed briefs defending the positions I have taken. When Professor Neuborne sought to file his briefs, however, he was asked by the Clerk of the Court for the Second Circuit what standing he had to file briefs and whom he represents in the appeals. The Clerk of the Court was under the impression that Professor Neuborne did not represent anyone. I file this memorandum to clarify the role that Professor Burt Neuborne plays in this lawsuit and in the current appeals.

As an initial matter, I agree that Professor Neuborne does not represent any party in the context of the current appeals. By submitting briefs, Professor Neuborne is simply providing an adversarial defense of my position for the benefit of the Second Circuit. In this sense, his current role is analogous to that of a lawyer who might be appointed to defend a judge's

decision after a writ of mandamus. In the typical case where a writ of mandamus is sought, the party to the case that benefitted from the underlying ruling will defend the judge's position on appeal. At times, however, there is no such party. For example, in a case where I decided to transfer a wiretap application to a magistrate judge for authorization, the United States Attorney sought a writ of mandamus, arguing that a magistrate judge would lack the power to order a warrant. *See In re United States,* 10 F.3d 931 (2d Cir.1993). Because of the ex parte nature of the wiretap application, there was no opposing party. Indeed, if the subject of the wiretap had been a party, he may have taken the same position as the United States Attorney. Thus, I received permission to retain counsel to be paid by the Administrative Office of United States Courts to provide an adversarial defense of my position in the Second Circuit. A similar situation arose recently for Judge Kram in the Southern District of New York, who had a party seek a writ of mandamus after she made certain rulings in the Austrian bank litigation-she appointed David Boies to defend her position on appeal. *See In re Austrian, German Holocaust Litigation,* 250 F.3d 156 (2d Cir.2001). While the current appellants do not seek a writ of mandamus, the same need for an adversarial defense of my position in the Second Circuit exists. Currently, Professor Neuborne is simply performing that service. Although his role in the appeals is thus limited, I do not wish to diminish the other roles that Professor Neuborne has played in this lawsuit.

Professor Neuborne played a vital role in achieving the historic settlement in this case. As I have already written:

> Professor Neuborne was a founding member of the Plaintiff's Executive Committee where he was the glue that held it together, and he was intimately involved in every significant aspect of the case. After the preliminary approval of the proposed settlement and the provisional certification of the class, he was designated lead plaintiffs' counsel.

*2 *In re Holocaust Victim Assets Litigation,* 270 F.Supp.2d 313, 316 (E.D.N.Y.2002).

Professor Neuborne has also played a vital role since the settlement. He has continued to represent the plaintiff class in post-settlement litigation involving the bank defendants. *See In re Holocaust Victim Assets Litigation,* 282 F.3d 103 (2d Cir.2002) (where Professor Neuborne represented plaintiffs in dispute over definition of the Slave Labor II class); *In re Holocaust Victim Assets Litigation,* 256 F.Supp.2d 150 (E.D.N.Y.2003) (where Professor Neuborne represented plaintiffs before Judge Block arguing that the defendants had to pay compound interest on settlement funds placed in escrow). He has continued to represent the plaintiffs in negotiations with the banks regarding increased access to bank records. *See In re Holocaust Victim Assets Litigation,* No. 04-CV-1786 (E.D.N.Y.2004). And he has represented the plaintiffs against the attempt of non-party intervenors to diminish the stake of the plaintiff class. *See In re Holocaust Victim Assets Litigation,* 225 F.3d 191 (2d Cir.2000) (where Professor Neuborne represented plaintiffs in dispute over whether the definition of Victims of Nazi Persecution had to be extended to include ethnic Poles). Professor Neuborne's efforts in these matters have resulted in tangible and substantial benefits to the class of plaintiffs as a whole.

On other issues, Professor Neuborne acts as something of a general counsel to the administration of the settlement fund. He provides an invaluable administrative service of helping people gain access to me and to the Special Master. He also provides advice as amicus curiae. Professor Neuborne has submitted many insightful declarations and, because of his long involvement in this case, his opinion is one that I respect. In this capacity, however, Professor Neuborne's recommendations have never been binding on me. In fact, in the context of the various appeals now pending before the Second Circuit, on more than one issue I decided to exercise my dis-

cretion in a manner different from that suggested by Professor Neuborne.

In sum, because this case resulted in a settlement fund that now needs to be administered, I have a fiduciary duty to the plaintiffs to ensure that any resulting distribution is fair and that any award of counsel fees is justified. *See Reynolds v. Beneficial Nat. Bank*, 288 F.3d 277, 279-80 (7th Cir.2002); *Maywalt v. Parker & Parsley Petroleum Co.*, 67 F.3d 1072, 1078 (2d Cir.1995). Various organizations and individuals who have been dissatisfied with my decisions are represented by their own counsel on their appeals. Professor Neuborne is providing an adversarial defense of my rulings where the principal beneficiaries of them do not have the resources to appear, as in the appeal involving Holocaust Survivors Foundation-USA, or where the detriment to any particular class member may not be of sufficient magnitude to warrant the cost of appearing, as in the remaining appeals.

APPENDIX I

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
THURGOOD MARSHALL U.S. COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

Roseann B. MacKechnie
CLERK

Date:	1/3/06
Docket Number:	04-1898-cv
Short Title:	Friedman v. Union Bank of Switze
DC Docket Number:	96-cv-4849
DC:	EDNY (BROOKLYN)
DC Judge:	Honorable Edward Korman

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurwood Marshall United States Courthouse, Foley Square, in the City of New York, on the 3rd day of January two thousand six.

Friedman v. Union Bank of Switzerland

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellant Samuel J. Dubbin, et al. Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED**.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

For the Court,
Roseann B. MacKechnie, Clerk
By: /s/ Tracy W. Young
Motion Staff Attorney

(2)

FILED
APR 29 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 05-1275

IN THE

Supreme Court of the United States

HOLOCAUST SURVIVORS FOUNDATION USA, INC., ET AL.,

Petitioners,

—v.—

UNION BANK OF SWITZERLAND, ET AL.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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Lead Settlement Counsel

COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Whether the unanimous panel of the Second Circuit erred in holding that the District Court acted lawfully in allocating funds set aside for the worldwide relief of the poorest survivors of the Holocaust solely on the basis of individual need without regard to current national residence? (*In re Holocaust Victim Assets Litig.*, 424 F.3d 132 (2nd Cir. 2005), *rehearing and rehearing en banc denied* (January 3, 2006)(upholding District Court's *cy pres* allocation formula)(reproduced as Appendices A (opinion) and I (denial of rehearing and rehearing *en banc*) to the petition for certiorari).

2. Whether petitioners, having filed and then withdrawn appeals raising the issues that they now urge in this petition, are precluded by principles of direct estoppel recognized in *Federated Dep't Stores, Inc. v. Motie*, 452 U.S. 394 (1981) from pursuing this appeal? (The relevant documents relating to the withdrawal of the prior appeals are reproduced in Appendix J to this brief in opposition).

3. Whether petitioners are barred by principles of direct and collateral estoppel from seeking to re-argue issues that were resolved by the Second Circuit in connection with an earlier appeal prosecuted with the assistance of court-appointed counsel by other members of the class? (*In re Holocaust Victim Assets Litig.*, 413 F.3d 183 (2nd Cir 2001)(upholding allocation formula and use of *cy pres* doctrine to distribute funds for relief of poorest Holocaust survivors)(reproduced as Appendix D to the petition for certiorari).

4. Whether petitioners are barred by principles of laches from challenging the procedural rules governing the administration of the $1.25 billion Swiss Bank Holocaust settlement more

than seven years into the administration of the settlement, after the distribution of more than $875 million to almost 400,000 persons throughout the world, especially where they filed and withdrew two appeals in May, 2001, raising the same issues?

5. Whether a unanimous panel of the Second Circuit erred in reviewing petitioners' procedural concerns, and rejecting them as wholly unjustified in view of the "exemplary" behavior of the District Court, the Special Master, and the Lead Settlement Counsel at "every step of the allocation and distribution of this historic settlement?" See *In re Holocaust Victim Assets Litig.*, 424 F.3d 132, 149 n. 15 (2nd Cir. 2005).

6. Whether chronic procedural deficiencies including lack of appellate jurisdiction, lack of standing, laches, direct estoppel, collateral estoppel and questionable motivation render this petition a particularly inappropriate vehicle to attack a unique, remarkably successful class action settlement on behalf of Holocaust victims and their heirs that has been praised as "exemplary" by the Second Circuit, and that has succeeded in distributing more than $875 million to almost 400,000 persons over the past seven years?

STATEMENT PURSUANT TO RULE 29.6

Although the nominal respondents are UBS and Credit Suisse, the petition is, in fact, directed against the settlement classes herein by several objectors who believe that the allocation formula utilized by the District Court in connection with the distribution of funds set aside under the *cy pres* doctrine for the relief of the poorest Holocaust survivors provides too much relief to 135,000 destitute survivors residing in the former Soviet Union, at the expense of less needy survivors residing in the United States. Accordingly, no respondent holds stock in a relevant entity.

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IN THE
SURPREME COURT OF THE UNITED STATES

No. 05-1275

HOLOCAUST SURVIVORS FOUNDATION USA, INC, *ET AL.*,

Petitioners

v.

UNION BANK OF SWITZERLAND, ET AL.,

Respondents

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENTS' BRIEF IN OPPOSITION

Summary of Argument

Petitioner, "G.K.," a survivor of the Holocaust residing in South Florida, seeks to challenge the validity of an allocation formula governing the distribution of funds set aside for the relief of the poorest survivors of the Holocaust adopted by the District Court on November 22, 2000, in connection with the administration of the historic $1.25 billion class action settlement of Holocaust-era claims against Swiss banks[1]

---

[1] "G.K." is the only petitioner with Article III standing to challenge the District Court's allocation rulings. The purported lead petitioner, the Holocaust Survivors Foundation, USA, Inc., (HSF) claims to speak for all

Petitioner does not challenge the fairness of the $1.25 billion Swiss bank settlement. Nor does petitioner challenge the allocation of settlement funds among the five settlement classes, or the administration of any of the claims programs. Petitioner does not challenge the finding that the Looted Assets class is incapable of individualized claims-based administration, requiring resort to the *cy pres* doctrine. Nor does petitioner quarrel with the finding that the expenditure of looted assets funds for the relief of the poorest Holocaust survivors throughout the world constitutes an appropriate exercise of *cy pres*. Finally, petitioner does not quarrel with the proposition that a supervising District Judge enjoys extremely broad discretion in choosing among available *cy pres* options.

Indeed, the only argument advanced by petitioner is that the District Court was required, as a matter of law, to allocate funds for the poorest survivors on the basis of the total number of Holocaust survivors currently residing in each country without regard to need, even though such a formula provides an inequitable windfall to the United States, with its large survivor population and its relatively small number of extremely poor survivors, and imposes an inequitable penalty upon destitute survivors residing in the former Soviet Union, where the incidence of great want among the survivor population is enormous.

Holocaust survivors residing in the United States. However, apart from its grandiose name, HSF has neither official status, nor individual members. See 424 F3d. at 146, n. 13. (App A). Appellate jurisdiction is lacking, as well, since the allocation formula at issue was adopted by a final order dated November 22, 2000, rendering the April 8, 2004 notice of appeal from a subsequent November, 2003 order routinely applying the formula to $60 million in interest untimely. See *In re Holocaust Victim Assets Litig.*, 282 F.3d 103, 105-107 (2nd Cir. 2002)(dismissing appeal from similar subsequent implementing order as untimely).

The District Court firmly rejected the "national quota" allocation scheme, characterizing it as "arbitrary and unreasonable." *In re Holocaust Victim Assets Litig.*, 302 F. Supp.2d at 109. (App G 35) Judge Cabranes, writing for a unanimous Second Circuit panel, agreed, stating:

> There are at least two reasons why the District Court did not exceed its discretion by rejecting HSF's proposed allocation methodology. First, the HSF's methodology implies that Jewish Holocaust survivors who reside in the United States today are legally entitled to a particular share of the settlement fund based on their *total* number (rather than the number of *needy* survivors among them). We find no legal or equitable support for this view...
>
> Second, the District Court articulated a compelling equitable reason to reject the HSF's proposed allocation. As a logical matter, the methodology "is tailored to benefit individuals who are part of a small group of needy survivors within a large nationwide survivor population.' *In re Holocaust Victim Assets Litig.*, 302 F. Supp.2d 95. Needy survivors in the United States are precisely the group that stands to gain, since the United States share of *needy* Holocaust survivors is substantially less than the United States' share of *all* Holocaust survivors. *Id.* But from the perspective of the *worldwide* population of needy Holocaust survivors – the population for which the funds allocated to the Looted

> Assets Class are being distributed – there is nothing equitable about an allocation methodology that provides the "relatively few needy survivors" in the United States "with a disproportionate benefit solely because of the overall size of the survivor community in the United States. *Id* at 109.

In re Holocaust Victim Assets Litig., 424 F.3d at 148-49 (2nd Cir 2005), *rehearing and rehearing en banc denied* (January 3, 2006). (App. A 28-29; App. I).

II

Almost seven years after the fairness hearings which took place in Brooklyn on November 29, 1999 and in Jerusalem on December 14, 1999, and after the distribution of more than $875 million to almost 400,000 persons around the world, including more than $190 million to persons residing in the United States (See Appendix M to the brief in opposition), petitioner argues that the members of the settlement classes should not have been asked to decide whether to opt out before knowing precisely how much each would receive under the allocation plan, and that multiple separate counsel were required for each of the five settlement classes (and, presumably, for each of the five victim groups – Jews, Jehovah's Witness, Sinti-Roma, gays and the disabled), and even, as this petition makes clear, each of the five geographical residence areas (Israel, United States, former Soviet Union, Europe, and the rest of the world) – a potential total of 125 separate counsel).

As a procedural matter, the structural challenges are barred by settled doctrines of preclusion and laches. Mr. Dubbin, counsel for HSF and counsel of record herein, raised the issues that he seeks to raise herein in two appeals to the

Second Circuit in 2000, only to withdraw both appeals in May, 2001. (See Appendix J). Moreover, in July, 2001, a parallel appeal raising similar procedural issues was prosecuted by members of the class represented by court-appointed counsel. *In re Holocaust Victim Assets Litig.*, 413 F.3d 183 (2d Cir. 2001) (Appendix D). The Second Circuit upheld the District Court's allocation formula, and the decision to dedicate looted assets funds under the *cy pres* doctrine for the relief of the poorest Holocaust survivors. *Id.* No appeal was taken from the Circuit's 2001 decision, which, in conjunction with the withdrawal of Mr. Dubbin's appeals, definitively resolved all procedural challenges to the Swiss bank settlement. *Federated Dep't Stores, Inc. v. Motie*, 452 U.S. 394 (1981).

Most importantly, the Second Circuit looked closely into HSF's claims that the District Court had imposed a "flawed judicial process." Judge Cabranes, writing for a unanimous panel, stated:

> The HSF's appellate brief averts to the "District Court's 'flawed judicial process,' referring principally to (1) the District Court's approval of the Settlement Agreement before adopting a plan for distributing and allocating settlement funds; and (2) alleged "assurances by the Lead Settlement Counsel and the court that the initial allocation imbalance would be rectified with subsequent distributions of larger amounts" for the benefit of survivors residing in the United States. Appellants' Br. at 26. The HSF characterizes these purported procedural irregularities as "examples" by which this Court's "examination" of the merits of this appeal would be "informed." *Id* at 17, 20.

> *Upon carefully reviewing the record of this case, we find no evidence whatsoever of a 'flawed judicial process.' To the contrary, the careful consideration that the District Court, the Special Master, and the Lead Settlement Counsel have accorded to every step in the allocation and distribution of this historic settlement has been exemplary.*

424 F3d at 149, n.15 (emphasis added) (App. A 30).

COUNTER-STATEMENT OF THE CASE:

AN OVERVIEW OF THE IMPLEMENTATION OF THE SWISS BANK HOLOCAUST SETTLEMENT

Petitioner's counsel paint a myopic and inaccurate picture of the implementation of the Swiss bank settlement, claiming that it has been unfair to Holocaust survivors residing in the United States. [2]

In fact, the extraordinarily successful implementation of the Swiss bank settlement has treated Holocaust survivors

---

[2] The nature of the Swiss bank settlement is discussed in *In re Holocaust Victim Assets Litig.*, 105 F. Supp.2d 139 (EDNY 2000)(upholding fairness of settlement)(App B). The secondary literature describing the settlement is substantial. Eg. MICHAEL J. BAZYLER, HOLOCAUST JUSTICE: THE BATTLE FOR RESTITUTION IN AMERICAN COURTS (2003); Burt Neuborne, *Preliminary Reflections on Aspects of Holocaust-Era Litigation in American Courts*, 80 Wash. U. L. Q. 795 (2002). The most complete description of the litigation occurs in the magisterial two volume report of the Special Master supporting his recommended plan of allocation. The report was before the Court below. JA 2053-2577; 5698. It is available on line at www.swissbankclaims.com.

throughout the world with scrupulous equality and fairness in distributing, to date, more than $875 million to approximately 400,000 persons, including more than $190 million to persons residing in the United States. *Letter, dated April 24, 2006, from Special Master to District Court Summarizing Current Distributions from Settlement Fund*)(App M). To date, approximately 29% of the settlement funds have been distributed to persons residing in the United States, even though only 14%-19% of the survivor population resides in the United States.[3] *Id.* Indeed, the only segment of the Swiss settlement funds that has not been disproportionately distributed to persons residing in the United States is the $205 million set aside for the relief of the poorest survivors – precisely because the bulk of the poorest survivors do not live in the richest country on earth, but are

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[3] The information on demographics and relative need before the District Court was drawn primarily from Andrew Hahn et al., *Jewish Elderly Nazi Victims: A Synthesis of Comparative Information on Hardship and Need in the United States, Israel, and the Former Soviet Union* (2004) (a Report prepared for the Joint Distribution Committee by researchers from Brandeis University), *available at* http://www.cmjs.org/files/JDCBrandeisReport01-26-04Final.pdf). As Chief Judge Korman noted in his March 9, 2004 opinion rejecting HSF's proposed formula, the best available demographic information places 14%-19% of Holocaust survivors in the United States, and 19%-27% in the former Soviet Union. Demographic studies indicate that the number of Holocaust survivors requiring assistance with basic necessities of life such as food, fuel in winter and warm blankets is far higher in the former Soviet Union, reaching a minimum of 135,000 identified persons; while the incidence of comparable need in the United States is far lower, numbering less than 5,000. See *In re Holocaust Victim Assets Litig.*, 302 F. Supp.2d 89, *reh'g denied*, 311 F. Supp. 363 (EDNY 2004)(explaining basis for denial of HSF objections)(App G), cited with approval in *In re Holocaust Victim Assets Litig.*, 424 F.3d 132, 144-145 (2nd Cir. 2005), *rehearing and rehearing en banc denied* (Jan. 3, 2006) (upholding District Court's *cy pres* allocation formula)(App A) (opinion); (App I) (denial of rehearing).

disproportionately clustered in the economic ruins of the former Soviet Union.[4]

The Swiss bank settlement, signed on January 26, 1999, calls for the payment of $1.25 billion by two Swiss banks – UBS and Credit Suisse – in return for the release of most Swiss entities (except all but two Swiss insurance companies) from claims by Holocaust victims arising out of the WW II behavior of Swiss entities.

The settlement agreement provides relief to the members of five victim groups – Jews, Jehovah's Witnesses, Sinti-Roma, gays and the disabled – who bore the brunt of Nazi persecution.[5] The agreement provides for payments to members of the five victim groups in connection with five violations of law: (1) failure to return "deposited assets" placed in Swiss banks for safekeeping; (2) forced labor for German companies in settings assisted by Swiss banks; (3) forced labor for Swiss companies; (4) exclusion from, or mistreatment in, Switzerland on grounds of religion or ethnic status; and (5) knowing "fencing" by Swiss entities of assets looted by Nazis.[6]

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[4] To date, 41% of distributions to the Deposited Assets class; 23% of the distributions to the Slave labor I class; and 41% of the distributions to the Refugee class have gone to persons residing in the United States. (App. M).

[5] The Second Circuit has affirmed the decision to limit participation in the settlement classes to members of the five victim groups. *In re Holocaust Victim Assets Litig.*, 225 F.3d 191 (2nd Cir. 2000).

[6] The discrete violations of law are reflected in the membership of the five settlement classes: (1) the Deposited Assets class is made up of members of the five victim groups seeking the return of funds deposited in Swiss banks on the eve of the Holocaust; (2) the Slave Labor I class is made up of members of the five victim groups who performed slave labor for German companies receiving financial assistance from Swiss banks;

The settlement agreement did not seek to allocate the $1.25 billion settlement fund among the five settlement classes; among the five victims groups; or among the five geographical areas – Israel, the United States, the former Soviet Union, Europe and the rest of the world - within which the victims reside. Instead, the District Court adopted a scrupulously fair two-step procedure that, first, determined whether the $1.25 billion settlement was fair; and, second, asked the members of the settlement classes to pre-commit to the outcome of a fair process for allocating and distributing the settlement funds. See *In re Holocaust Victim Assets Litig.*, 105 F. Supp.2d 139 (EDNY 2000)(App B). Class-members who were unwilling to pre-commit to the results of the fair allocation procedures were offered the opportunity to opt out. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985). Class members who failed to opt out, but who objected to the outcome of the allocation process, were assured judicial review of the lawfulness of any allocation.

The scrupulously fair allocation process consisted of a neutral court-appointed Special Master with a duty to develop a proposed plan of allocation and distribution after broad consultation with any member of the settlement classes who wished to be heard, either with or without counsel; and a financially unconflicted[7] Lead Settlement Counsel, one of

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(3) the Slave Labor II class is made up of persons who performed slave labor for Swiss-owned companies; (4) the Refugee class is made up of members of the five victim groups who were excluded from, or were abused in, Switzerland during WW II because of race, religion or ethnicity; and (5) the Looted Assets class is made up of members of the five victim groups who suffered looting at the hands of the Nazis *and* whose assets were improperly "fenced" by Swiss entities.

[7] Lead Settlement Counsel was financially unconflicted within the meaning of *Amchem Prods. v. Windsor*, 521 U.S. 591 (1997), first,

whose principal duties was to assure unfettered access to the Special Master for all class members wishing to communicate with him concerning the allocation of the settlement proceeds. *Id.*

Once a proposed plan of allocation was developed, the Special Master was to notify the members of the settlement classes of the plan's content, and present the plan to the Court for its consideration. The Court was to hold a hearing on the proposed plan, and put the plan into effect only if it appeared fair and just.

The settlement classes overwhelmingly approved the pre-commitment strategy, returning more than 564,000 questionnaires expressing a willingness to participate in the allocation process. After two fairness hearings, Chief Judge Korman explicitly accepted the settlement as fair, including the pre-commitment strategy. *In re Holocaust Victim Assets Litig.*, 105 F. Supp.2d 139 (EDNY 2000) (App B).

After 18 months of intense communication with class members, the Special Master proposed a plan of allocation in September, 2000. See *Special Master's Proposed Plan of Allocation and Distribution* (September 11, 2000)(available on line at www.swissbankclaims.com). After notice to the class, and a full day of hearings before the District Court, Chief Judge Korman approved the proposed allocation plan on November 22, 2000. *In re Holocaust Victim Assets Litig.*, 2000 WL 33241660 (EDNY Nov. 22, 2000)(App C), aff'd 413 F.3d 183 (2d Cir. 2001)(App. D).

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because he had no economic interest in the approval of the settlement since he had waived attorneys' fees for helping to achieve it; and, second, because his hourly lodestar compensation as Lead Settlement Counsel was completely independent of any particular allocation.

The plan of allocation adopted by the District Court recognized that the claim for the return of Swiss bank accounts was the legal heart of the case. Accordingly, based on information revealed in an audit of Swiss banks conducted by Paul Volcker which had been made public on December 8, 1999, the District Court accepted the recommendation that up to $800 million be allocated to the Deposited Assets class, and established an elaborate claims procedure headquartered in Zurich to adjudicate the many thousands of claims for Swiss bank accounts that resulted from the publication, pursuant to the settlement agreement, of information concerning 21,000 (subsequently increased to 24,000) "probable or possible" Holocaust victim-owned Swiss accounts. *In re Holocaust Victim Assets Litig.*, 413 F.3d 183 (2nd Cir 2001) (upholding allocation of up to $800 million to deposited assets class) (App. D). To date, approximately $375 million has been distributed to owners of WW II Swiss bank accounts. (App M). It currently appears that the claims procedure will be successful in distributing much, if not all, of the $800 million to owners of WW II accounts.[8]

The District Court also accepted the Special Master's recommendation that each survivor forced to work in a slave labor camp for German or Swiss companies receive $1,000 (in addition to the $7,500 awarded by the German Holocaust Foundation: Remembrance, Responsibility and the Future).[9]

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[8] Petitioner's assertion at p.12 of the *Petition* that the *cy pres* fund will grow to between $500-$600 million is wildly overblown. In fact, it appears that once the deposited assets claims process is completed, little or no residual funds will remain to supplement the existing *cy pres* fund.

[9] Lead Settlement Counsel serves as one of the two United States representatives on the Board of Trustees of the German Holocaust Foundation, permitting a degree of coordination between the two funds which occasionally overlap in providing benefits to slave laborers. The

The $1,000 figure was subsequently raised to $1,450 as a result of interest earned on the settlement funds during the period of administration, and as a result of Congress's exemption of the settlement fund's earnings and distributions from federal income taxation. *In re Holocaust Victim Assets Litig.*, 2000 WL 33241660 (EDNY November 22, 2000)(adopting proposed allocation plan)(App. C). See Sec. 803, *H.R. Conf. Rep.* 1836 (2001). Slave laborers have received approximately $275 million, to date.[10] (App M).

Finally, the District Court accepted the Special Master's recommendation that $100 million (subsequently increased to $205 million as the result of tax exempt interest earned on the settlement fund) be allocated to the Looted Assets class, both because of the relatively weak legal underpinnings of the class's legal claims against Swiss entities, and because of the virtual impossibility of individualized administration of a looted assets claims program. See *In re Holocaust Victim Assets Litig.*, 2000 WL 33241660 (EDNY November 22, 2000)(allocating $100 million to looted assets class for *cy pres* relief of poorest Holocaust survivors))(App C); *In re Holocaust Victim Assets Litig.*, CV 96-4849 (ERK)(MDG) (unreported)(September 25, 2002) (applying allocation formula to $45 million in interest earned on the settlement fund)(App. E); *In re Holocaust Victim Assets Litig.*, 96 CV 4849 (ERK)(MDG), 2003 U.S. Dist. LEXIS 20686 (EDNY November 17, 2003)(rejecting HSF challenge to allocation

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combined resources of the Swiss Bank Holocaust settlement and the German Holocaust Foundation approximate $7 billion. See *American Insurance Association v. Garamendi*, 539 U.S. 396 (2003).

[10] The District Court approved, as well, payments to persons who were excluded from, or mistreated in, Switzerland during WW II because of race or religion ranging from $725 to $3,625, depending upon the severity of the conduct. *Id.* To date, approximately $11 million has been distributed to the so-called "refugee class." (App M).

formula and applying formula to $60 million in interest earned on settlement fund).

Four of the five settlement classes were provided with a carefully designed claims process. Claims for Swiss bank accounts were and are adjudicated by a Claims Resolution Tribunal (CRT II) in Zurich initially headed by Paul Volcker in his capacity as a Special Master reporting directly to the Court. Slave labor claims by Jewish claimants were and are processed by the Conference on Jewish Material Claims Against Germany (the "Claims Conference"), headquartered in New York City. Slave labor claims by non-Jewish claimants (Sinti-Roma, Jehovah's Witnesses, gays and the disabled)) were and are processed by the International Organization on Migration (IOM) headquartered in Geneva.

The claims programs in connection with the Deposited Assets, Slave Labor I, Slave Labor II, and Refugee classes have been remarkably successful, enabling the Swiss bank settlement to have distributed more than $660 million, to date, (exclusive of the $205 million distributed or firmly allocated to social agencies by the Looted Assets class, and the $10 million to the Victims' List Foundation) on the basis of individualized consideration of eligibility – an astonishing achievement given the 60 years that have elapsed since WW II, and the wholesale destruction of bank records by the Swiss banks.[11] (App M).

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[11] The approximate distribution figures as of April 24, 2006 are: Deposited Assets - $375 million; Slave Labor I and II - $275 million; Refugee - $11 million; Looted Assets - $205 million; and Victims' List Foundation/Yad Vashem and the United States Holocaust Memorial Museum - $10 million to establish a definitive list of Holocaust victims. (App M).

One class defied individualized administration. The Special Master reported to the Court in September, 2000 that it would be impossible to determine which items of Nazi loot had been knowingly "fenced" by Swiss entities, and which had been disposed of through German or other entities, rendering it impossible to engage in an individualized Looted Assets claims process. See *Special Master's Proposed Plan of Allocation and Distribution* (September 11, 2000)(available on line at www.swissbankclaims.com). Accordingly, the Special Master urged the Court to consider *cy pres* distribution of the looted assets funds for the relief of the poorest Holocaust survivors throughout the world. *Id.* The District Court adopted the recommendation. *In re Holocaust Victim Assets Litig.*, 2000 WL 33241660 (EDNY November 22, 2000) (adopting allocation formula) (App. C). The Second Circuit affirmed. 413 F.3d 183 (2nd Cir. 2001)(App D).

The Special Master engaged in an intensive investigation, with the active cooperation of class members and demographic experts, in an effort to determine the whereabouts of the poorest Holocaust survivors in the greatest need.[12] Pursuant to the investigation, 10% of the looted assets fund (or $20.5 million) was allocated for relief of impoverished non-Jewish survivors residing in Eastern Europe under the auspices of the IOM. The remaining 90% (or $184.5 million) was allocated for the relief of impoverished Jewish survivors residing throughout the world. Based on exhaustive studies of the geographical distribution of the poorest Jewish survivors, the Special Master recommended – and the District Court approved - a distribution of 75% of the Jewish *cy pres* funds to the Joint Distribution Committee's *Chesed* program for the relief of

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[12] See n. 3. *supra.*

135,000 identifiable Holocaust victims living in utter destitution in the former Soviet Union. The remaining Jewish *cy pres* funds were allocated on the basis of the number of similarly destitute persons requiring immediate assistance with the basic necessities of life residing in each country: 12.5% to Israel; 4% to the United States; 4% to Eastern Europe; 3% to Western Europe; and 1% to the rest of the world. *In re Holocaust Victim Assets Litig.*, 2000 WL 33241660 (EDNY November 22, 2000) (adopting allocation formula) (App. C).

Samuel Dubbin, counsel of record for petitioners herein, acting on behalf of the individuals who eventually formed HSF and who appear as petitioners herein, challenged the Jewish *cy pres* allocation formula, claiming that it short-changed survivors residing the United States. On September 8, 2000, Mr. Dubbin filed an appeal from the District Court's fairness order, which had been entered on August 9, 2000. On December 21, 2000, Mr. Dubbin filed an appeal from the District Court's allocation order which had been entered on November 22, 2000. However, on May 15, 2001, confronted with a Second Circuit order directing him to file his brief and appendix by May 15, 2001, or suffer the dismissal of his appeals, Mr. Dubbin moved for leave to withdraw both appeals. On May 30, 2001, leave to withdraw both appeals was granted and the appeals were dismissed. (App J).

On July 26, 2001, in a parallel appeal prosecuted by other class members with the assistance of court-appointed counsel, the Second Circuit explicitly affirmed the Special Master's plan of allocation among the classes, including the decision to allocate up to $800 million to the deposited assets class, and the decision to utilize the *cy pres* doctrine to permit distribution of funds allocated to the looted assets class for the relief of the poorest survivors. *In re Holocaust Victim*

Assets Litig., 413 F.3d 183 (2d Cir. 2001) (App D). No appeal was taken from the Second Circuit's decision.

Finally, on September 9, 2005, the Second Circuit unanimously upheld the District Court's decision to allocate the looted assets Jewish *cy pres* funds on the basis of worldwide need, not national population quotas, and characterized the administration of the Swiss bank settlement as "exemplary." *In re Holocaust Victim Assets Litig.*, 424 F.3d 132 (2nd Cir. 2005). (App.A). On January 3, 2006, the Second Circuit, without dissent, denied petitioner's application for re-hearing and re-hearing *en banc*. (App I). This petition followed.

REASONS FOR DENYING THE WRIT

Petitioner's narrow quarrel with the District Court's Jewish *cy pres* allocation formula does not present an inter-Circuit conflict, and does not raise significant and recurring issues of law warranting review by this Court. Indeed, the unique nature of the Swiss Bank Holocaust settlement, involving, as it does, five worldwide settlement classes receiving compensation for unique events transpiring in Europe more than 60 years ago, coupled with: (1) the unusually intense judicial supervision of the settlement's administration provided by Chief Judge Korman; (2) the role of the United States in helping to broker the settlement; (3) the undeniable success of the settlement in distributing more than $875 million to almost 400,000 persons to date; and (4) and the Second Circuit's characterization of the settlement's administration as "exemplary," renders this proceeding an unusually poor candidate for certiorari.

I.

No Legal or Equitable Basis Exists to Question the *Cy Pres* Allocation Formula Recommended by the Special Master, Adopted by the District Court, and Unanimously Affirmed by the Second Circuit

Petitioner "G.K." claims that the District Court's formula, which allocates funds for the relief of the poorest survivors of the Holocaust solely on the basis of relative individual need without regard to national residence, results in too much assistance being provided to 135,000 identifiable destitute Holocaust survivors residing in the former Soviet Union, and not enough to less needy survivors residing in the United States. "G.K." demands an allocation formula keyed to national residence, insisting that limited funds devoted to the relief of the poorest Holocaust survivors throughout the world be initially allocated *per capita* on the basis of the total number of Holocaust survivors residing in each country (whether or not they are needy); and only then be distributed to the poorest survivors residing in each country.

Not surprisingly, given the avowedly parochial nature of HSF as an organization devoted to advancing the interests of Holocaust survivors residing in the United States, such a formula is tailor-made to benefit survivors residing in the United States, which has between 14%-19% of the survivor population,[13] but which has a much lower proportion of survivors in great need.

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[13] Petitioner's unsupported assertion that 30% of all Holocaust survivors currently reside in the United States is incorrect. In fact, demographic studies conducted under the auspices of Brandeis University reveal that between 14%-19% of the Holocaust survivor population resides in the United States. See *In re Holocaust Victim Assets Litig.*, 302 F. Supp.2d 89, 97 (EDNY 2004)(App. G 13).

In support of such an inequitable allocation formula, petitioner offers several wholly unpersuasive arguments.[14] First, petitioner argues that the District Court's decision to allocate *cy pres* funds on the basis of worldwide individual need, not national population quotas, violates the principle of intra-class equity because it results in the distribution of most of the *cy pres* funds for the relief of 135,000 destitute residents of the former Soviet Union, and only a relatively small amount of the funds to those survivors residing in the United States manifesting a roughly comparable level of need. But, as the Second Circuit noted, such an argument rests on the question-begging assumption that Holocaust survivors residing in the United States enjoy a baseline group entitlement to a *per capita* allocation of the *cy pres* looted assets funds, regardless of economic need. *In re Holocaust Victim Assets Litig.*, 424 F.3d at 148-49 (2nd Cir. 2005), *rehearing and rehearing en banc denied* (January 3, 2006)(App A 28).

In fact, there are no presumptive national shares, just as there are no presumptive shares payable to any group of

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[14] Petitioner's purported legal authority for the proposition that the District Court was legally obliged to adopt HSF's inequitable allocation formula is completely irrelevant. Not a single case cited by petitioner involves the *cy pres* allocation of funds to the neediest members of a class. See 424 F.3d at 147-48. (App. A26-27). It is, of course, true that in the absence of a valid *cy pres* decision to confine distribution of a class's assets to the neediest members of the class, it would be improper to distribute assets on the basis of need rather than legal entitlement. That is why deposited assets, slave labor and refugee distributions are calculated without regard to need. But where, as with the looted assets class, a valid and unchallenged decision has been made to devote class assets to the relief of the poorest members of the class, petitioner's authority for allocating funds on the basis of raw population is simply beside the point.

victims.[15] Membership in the settlement classes is not a group phenomenon, but a consequence of the shared individual experience of having been both the target of Nazi lunatics, and the victims of Swiss duplicity. The District Court's *cy pres* allocation formula – a formula that ignores national residence and targets relative individual need on a worldwide basis - treats all survivors equally as individuals, and awards *cy pres* funds only to those extremely poor survivors who meet the principled criteria of great need. To argue, as does petitioner, that such a result is "unequal" because it results in most of the *cy pres* money being spent on the poorest survivors, who happen to reside in the former Soviet Union, is to misunderstand the very idea of equality. The essence of equality is to treat like persons alike, and different persons differently. The District Court's allocation formula achieves precisely that result by applying a principled test that identifies the survivors in greatest need wherever they may live, and deploys the *cy pres* funds for their relief. In fact, as the Second Circuit noted, it is the HSF formula that would violate the equality principle by providing the United States survivor community with an unfair windfall. *In re Holocaust Victim Assets Litig.*, 424 F.3d at 148-49 (2nd Cir 2005), *rehearing and rehearing en banc denied* (January 3, 2006). (App. A 28-29; App. I).

Petitioner argues that in describing the factors that have led to the desperately impoverished condition of Holocaust survivors residing in the former Soviet Union, the District

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[15] Similar efforts to assert group-based entitlements to a share of the Swiss bank settlement have been rejected by the District Court and affirmed by the Second Circuit. See *In re Holocaust Victim Assets Litig.*, 424 F.3d 159 (2nd Cir. 2005)(upholding refusal to allocate *cy pres* funds to gay community); *In re Holocaust Victim Assets Litig.*, 424 F.3d 169 (2nd Cir. 2005)(upholding refusal to allocate *cy pres* funds to the disabled community).

Court adopted extraneous allocation criteria having nothing to do with the survivors' underlying legal claims. See *In re Holocaust Victim Assets Litig.*, 302 F. Supp.2d at 144-45; 147, *reh'g denied*, 311 F. Supp. 363 (EDNY 2004)(App G) (explaining basis for denial of HSF objections). But petitioner misunderstands the purpose of the District Court's recitation of the factors leading to the currently desperate condition of Holocaust survivors in the former Soviet Union. The District Court's recitation of the history and current causes of the plight of destitute Holocaust survivors residing in the former Soviet Union was descriptive, not allocative. The sole allocation criteria used by the District Court was relative current need – a criteria that cannot be measured, described or explained without reference to history (especially the inability to have provided reparations to survivors trapped behind the Iron Curtain, the collapse of the Soviet economy, and the exodus of much of the Soviet Jewish community), as well as reference to currently available alternative sources of assistance.

Petitioner also argues that the District Court's allocation formula results in an unlawful failure to provide most members of the looted assets class with any tangible benefit in return for their release of their looted assets claims. It is unclear, however, why the vast bulk of United States survivors would be better off under HSF's formula than under the District Court's formula. In both settings, once a valid *cy pres* decision is made to devote looted assets funds to the relief of the poorest survivors – a decision that HSF does not challenge - the vast bulk of the looted assets class will, of necessity, receive nothing tangible, except the psychic satisfaction of assisting the poorest survivors. Why the psychic satisfaction of survivors residing in the United States would be enhanced by a formula that unfairly reduces the ability to aid destitute survivors residing in the former Soviet Union, while unfairly increasing the ability to aid less

needy survivors residing in the United States, is a secret known only to the leadership of HSF.

Finally, petitioner argues that the District Court's allocation formula does not provide a benefit to the looted assets class as a whole, but privileges a segment of the class. But, once again, it is unclear why the HSF formula would benefit a broader segment of the class. Under both the HSF formula and the formula adopted by the District Court, tangible benefits will flow to only a small proportion of the looted assets class – the portion in greatest need. Indeed, once the judgment was made to devote the looted assets funds to the relief of the poorest survivors – a judgment that HSF does not challenge - it became inevitable that most members of the looted assets class as a whole would not receive tangible benefits from the fund. To be sure, the entire class does receive a psychic benefit from the principled use of the fund to relieve the distress of the poorest members of the class. But why that psychic benefit is dependent on unfairly privileging survivors residing in a survivor's country of residence at the expense of poorer survivors residing elsewhere, is another mystery known only to the leadership of HSF.

In short, the legal Rubicon was crossed when all agreed that, pursuant to the *cy pres* doctrine, looted assets funds should be dedicated to the relief of the poorest survivors. At that point, no individual looted assets class member could be said to have retained a legally cognizable individual interest in a *pro rata* share of the looted assets funds. Instead, the class members were entitled to the principled application of an allocation formula designed to identify those members of the class most in need. That is exactly what they have received.

II. No Legal or Equitable Basis Exists to Question the Meticulously Fair Procedures Utilized by the District Court That Have Been Praised as "Exemplary" By the Second Circuit

A. The Petition is Barred by Direct Estoppel and Laches

Petitioner, seeking to pose a belated, jurisdictionally-deficient and wholly unpersuasive challenge to the structure of the Swiss bank settlement, appears to argue that (1) multiple separate counsel were required for each interest group in connection with the allocation process; (2) the opt out process should have been deferred until the completion of the allocation proceedings; and (3) Lead Settlement Counsel failed in his duty of loyalty owed to survivors residing in the United States because he supported the District Court's allocation formula.

Such a belated effort – fully seven years into the settlement's administration - to question the basic structure of the Swiss bank settlement is clearly barred by principles of direct estoppel, issue preclusion and laches. Most directly, Mr. Dubbin, counsel of record herein, acting on behalf of the persons who formed HSF and who are pursuing this appeal, raised the procedural concerns in connection with two appeals in September and December, 2000, from the District Court's August 9, 2000 fairness order, and from the District Court's November, 22, 2000 order adopting the Special Master's proposed plan of allocation and distribution (including the very *cy pres* allocation formula he seeks to challenge in this proceeding), only to withdraw both appeals on May 15, 2001, the date his appendix and appellate briefs were due in the Second Circuit. (App J). Accordingly, this proceeding is precluded. *Federated Dep't Stores, Inc. v.*

Motie, 452 U.S. 394 (1981); *Montana v. United States*, 440 U.S. 147 (1979).[16]

In *Federated Dep't Stores*, one of several plaintiffs failed to pursue an appeal to the Ninth Circuit from the dismissal of their anti-trust complaint. When the Ninth Circuit reversed the District Court and ordered reinstatement of the complaint, the non-appealing party sought reinstatement, as well. This Court ruled that having failed to pursue an appeal, the non-appealing party was precluded from continuing to seek relief. In this case, the predecessors and founders of HSF formally withdrew their appeals raising the issues they seek to raise in this petition. (App J). Accordingly, HSF and its members and founders – all represented by Samuel Dubbin – are precluded under *Federated Dep't Stores* from challenging the structure of the Swiss bank settlement fully five years after they abandoned prior appeals raising the issue.

Even in the absence of direct estoppel, petitioner's challenge to the basic structure of the Swiss bank settlement is unquestionably barred by laches. In the five years since Mr. Dubbin abandoned his appeals in 2001, the Swiss bank settlement has distributed more than $875 million to approximately 400,000 persons. (App M). Although petitioner claims that this challenge is narrowly directed at the *cy pres* administration of the looted assets class,

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[16] The abandoned appeal from the fairness order was pursued in the name of Dr. Thomas Weiss, a founder of HSF, and a permanent member of its Board of Directors. The abandoned appeal from the District Court's allocation order was pursued on behalf of a number of HSF's founders, who also appear as petitioners herein. Mr. Dubbin was counsel in both abandoned appeals, as well serving as counsel of record in this proceeding. Under *Montana v. United States*, 440 U.S. 147 (1979), direct estoppel applies to HSF and its privies. (App. J).

petitioner's claim of structural insufficiency and constitutional inadequacy would, if upheld, erode the structural foundation of the entire settlement, leaving legal chaos in its wake, and causing untold harm to the members of the other four settlement classes. It would be inconceivable to permit a member of a class to abandon a timely appeal challenging the structural integrity of a complex settlement, and to wait five years until most of the funds have been disbursed before seeking to raise the identical issues in a new appeal.

B. The Procedures are Scrupulously Fair

Petitioner's argument on the merits is equally deficient. The insistence that Lead Settlement Counsel betrayed survivors residing in the United States because he defended the District Court's allocation formula is incomprehensible. The limited funds available for the relief of the poorest survivors did not begin to provide for the legitimate needs of poor survivors throughout the world. Like an inadequate blanket on a winter's night, shifting the limited funds to one set of survivors meant removing support from another set of deserving survivors. As the extraordinary opinion of the District Court demonstrates (App G), the allocation decision – described by the District Court as an "odious" responsibility – was the basis of sustained and principled investigation.[17] Lead Settlement Counsel exercised independent judgment and determined that the allocation formula proposed by the District Court was both equitable and well within its discretionary authority. Accordingly, Lead Settlement Counsel supported it. Why it was the duty of Lead Settlement Counsel to support an inequitable allocation

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[17] See n.3 *supra*.

formula that unfairly privileged survivors residing in the United States (who enjoyed separate legal representation) at the expense of destitute survivors residing in the former Soviet Union (who were otherwise unrepresented by counsel) is yet another mystery known only to the leadership of HSF.

Finally, petitioner's belated insistence that under *Amchem Products v.* Windsor, 521 U.S. 591 (1997) and *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999), multiple separate counsel were required for each settlement class, and the right to opt out should have been deferred until each class member knew the outcome of the allocation process, would have doomed the Swiss bank settlement to certain failure. A settlement agreement involving five victim groups, five settlement classes, and five areas of residence could not possibly assign separate adversarial counsel for each interested group. To have done so would have been economically wasteful, requiring the payment of multiple attorneys' fees from the settlement fund.[18] More importantly, it would have been socially ruinous, pitting the elements of the Holocaust survivor community against each other in a series of adversary exchanges that would have embittered the lives of elderly survivors. Indeed, the divisive activity of HSF in pitting Holocaust survivors against each other is merely an example of the divisiveness that would have been unleashed by turning multiple entrepreneurial lawyers loose in a setting where their fees turned on shifting portions of the settlement fund to their clients at the expense of other Holocaust survivors.

Instead, the District Court adopted a procedure pursuant to which a neutral Special Master was directed to develop a

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[18] Attorneys' fees, to date, have been limited to approximately $7 million for obtaining a $1.25 billion settlement

proposed plan of allocation after intense collaboration with every segment of the survivor community, aided by a Lead Settlement Counsel free from any financial conflict of interest. 105 F. Supp. 2d 139 (EDNY 2000) (App. B). Most importantly, any class member dissatisfied with the proposed fair allocation procedure was offered the opportunity to opt out in order to pursue an individual claim. *Id.* Given the unique circumstances of this historic settlement, the District Court's thoughtful design of a scrupulously fair allocation proceeding that was not calculated to tear the Holocaust survivor community apart was clearly consistent with the Due Process clause. See *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985).

Finally, petitioner's insistence that an absolute Due Process right exists to delay the decision whether to opt out until the completion of the allocation process is untenable under the unique circumstances of the Swiss bank settlement. Given the complexity of the settlement and the fact that the events underlying the claims took place more than 60 years ago, it would have been wholly impracticable to defer resolution of the basic fairness of the settlement until the completion of an allocation process that is still underway six years after the fairness hearing. Instead, unlike *Ortiz v. Fireboard Corp.*, 527 U.S. 815 (1999), which failed to provide for any opt out at all, the District Court's carefully designed fairness opinion offered class members a perfectly lawful choice between committing to a scrupulously fair allocation process, or opting out and pursuing an individual claim. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985).

In effect, petitioner argues that the Due Process clause guaranties segments of the class the right to exert pressure on the fair allocation process under threat of mass opt out. While such a right to engage in pressure tactics may be attractive to HSF, a well-funded lobby working on behalf of a single

group of survivors, it would have been unfair to the many survivors around the world who lack the resources to pressure the allocation process. Moreover, if survivors in the United States were entitled to threaten mass opt outs in order to pressure the allocation process, every other group of survivors was entitled to threaten a similar mass opt out, dooming the settlement. The pre-commitment alternative posited by the District Court assured the class an orderly method of allocating the settlement under scrupulously fair procedures, while offering a right to opt out to any member of the class unwilling to commit to such a fair allocation process.

III. The Troubling Entrepreneurial Nature of This Petition

The driving force behind this petition is a lawyer residing in Miami, Florida, Samuel Dubbin, who played no role in achieving this historic settlement, but who has repeatedly sought to enrich himself at the expense of the settlement fund.[19]

Mr. Dubbin's initial foray was as counsel to Dr. Thomas Weiss, a founder of HSF and a permanent member of its Board of Directors. Mr. Dubbin, acting on behalf of Dr. Weiss, initially challenged the fairness of the settlement in November, 1999. When the District Court approved the settlement as fair on August 9, 2000, Dr. Weiss and Mr. Dubbin asked to meet with the District Court to discuss a proposed appeal from the fairness order. Chief Judge Korman has described the meeting with Dr. Weiss and Mr. Dubbin:

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[19] The facts surrounding Mr. Dubbin's prior activities in this case are set forth in *In re Holocaust Victim Assets Litig.*, 424 F.3d 150 (2nd Cir 2005)(upholding denial of fees for Mr. Dubbin) (annexed to this brief in opposition as Appendix L).

> After the discussion appeared to be going nowhere, Dr. Weiss asked how much I would pay to prevent them from filing a notice of appeal. Specifically, he wanted me *to provide attorneys' fees* and funds for private research that would assist him in his litigation against [the Italian insurance firm] Generali. This was beyond the pale. I was not going to be blackmailed, particularly with funds that belong to Holocaust survivors.

In re Holocaust Victim Assets Litig., 311 F. Supp.2d 363, 375 (EDNY 2004)(App K)(emphasis added). See also 424 F.3d at 154. (App L).

Mr. Dubbin then filed a notice of appeal from the fairness order that effectively prevented distributions from the settlement fund for six months. When neither the District Court nor Lead Settlement Counsel would succumb to such pressure tactics, Mr. Dubbin finally withdrew his appeals in May, 2001 without ever filing a brief or appendix.[20] (App. J).

Mr. Dubbin then re-appeared as the author of a grotesque fee application seeking a total of $5.9 million - $3.6 million

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[20] Mr. Dubbin flagrantly misrepresents the withdrawal of his appeals in May, 2001, mischaracterizing the withdrawals as *quid pro quos* for an alleged promise by the District Court and by Lead Settlement Counsel to provide additional funds to survivors in the United States, even though he was explicitly and repeatedly informed by Judge Korman and by Lead Settlement Counsel no such promise existed. 302 F. Supp.2d at 119-120 (App G50-G54). The Second Circuit's reference to "exemplary" conduct by Lead Settlement Counsel was in response to Mr. Dubbin's repeated public mischaracterizations of the circumstances surrounding the withdrawal of his appeals. 424 F.3d at 149, n. 15. (App. A 30).

for himself, and $2.3 for Dr. Weiss. 424 F.3d at 155. (App L). Dr. Weiss eventually obtained new counsel and withdrew his request; but Mr. Dubbin insisted on being paid $600,000 (subsequently reduced to $309,000) for his alleged services to the class in connection with insurance releases. Mr. Dubbin also sought $3 million for his activities challenging the *cy pres* allocation formula. Judge Korman denied the fee application in its entirety, characterizing Mr. Dubbin's work as "worthless." *In re Holocaust Victim Assets Litig.*, 311 F. Supp. 363 (EDNY 2004) (App K). The Second Circuit affirmed. 424 F.2d 150 (2nd Cir. 2005) (App. L).

This petition is Mr. Dubbin's last chance to extract an attorneys' fee from the Swiss bank settlement fund. Having persuaded a few elderly Holocaust survivors residing in South Florida that they were treated unfairly by the District Court's painful decision to allocate the bulk of the *cy pres* funds to destitute survivors residing in the former Soviet Union, Mr. Dubbin seeks to topple the District Court's allocation formula in order to enable him to revive his $3 million fee application for "improving" the allocation formula.[21]

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[21] Mr. Dubbin complains that Lead Settlement Counsel, after waiving all attorneys' fees for having played a major role in achieving the $1.25 billion settlement, has requested discounted hourly lodestar fees for more than 8,000 hours of service to the settlement classes over the past seven years involving 29 separate legal proceedings, the renegotiation of crucial aspects of the settlement agreement, and the exemption of the settlement's earnings and distribution from federal income taxation. Mr. Dubbin suggests that Lead Settlement Counsel's support of the District Court's allocation formula was motivated by a desire to curry favor with Chief Judge Korman in order to obtain higher fees. *Petition*, p. 28, n 17. In view of Lead Settlement Counsel's 10 years of faithful service to Holocaust victims, the innuendo is beneath contempt. In order to assure absolute propriety in connection with the pending fee application, Chief Judge Korman has referred the matter to another judge.

Conclusion

For the above-stated reasons, the petition for certiorari should be denied.

Respectfully submitted

Burt Neuborne
40 Washington Square South
New York, New York 10012
Lead Settlement Counsel
(212) 998-6172

APPENDICES J, K, L, M

Appendix J

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 00-9217(L), 00-9614(Con)
MOTION INFORMATION FORM

In Re: Holocaust Victims

THOMAS WEISS,

Plaintiff-Appellant,

—v.—

UNION BANK OF SWITZERLAND, ET AL

Defendants-Appellees.

Movant:

	Yes	No
Consent sought from adversary(ies)?	☐	☐
Consent obtained from adversary(ies)?	☐	☐
Is oral argument desired?	☐	☐

ORDER

IT IS HEREBY ORDERED that the motion for withdrawal of appeals be and it *hereby* is granted.

FOR THE COURT,
Roseann B. Mackechnie,
Clerk

ANA VARGAS
By: Ana Vargas
Calendar Deputy Clerk

J-3

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket Nos. 00-9217 (L) and 00-9614 (Consolidated)

IN RE: HOLOCAUST VICTIMS
ASSET LITIGATION

THOMAS WEISS,

Plaintiff/Appellant,

—v.—

UNION BANK OF SWITZERLAND ET. AL.,

Defendants/Appellees.

AFFIDAVIT OF SAMUEL J. DUBBIN

Before me, the undersigned authority, personally appeared Samuel J. Dubbin, who being first duly sworn deposes and says:

1. My name is Samuel J. Dubbin. I am the President of Samuel J. Dubbin, P.A., partner in the law fug of Dubbin & Kravetz, LLP. My firm represents Thomas Weiss, M.D. Appellant in the appeals styled *Weiss v. Union Bank of Switzerland*, Docket No. 00-9217 (Fairness Appeal), and Docket No. 00-9614 (Allocation Appeal),

and Appellants L Joseph Sachs and David Mermelste individually and on behalf of the Coalition of South Florida Holocaust Survivors Clubs; Leon Stabinsky, individually and on behalf of the California Association ofRolocaust Child Survivors; Leo Rechter, individually and on behalf of the National Association ofJewish Child Holocaust Survivors, Case No. 99-9614 (Allocation Appeal). This Affidavit is submitted in support of Appellants' Motion for Withdrawal of these appeals.

2. Upon consideration, the Appellants have determined to withdraw these appeals.

3. The undersigned has conferred with Burt Neuborne, Esquire, Lead Plaintiffs Settlement Counsel in the matter below and in these appeals. He has agreed that this withdrawal should be without assessment of costs.

FURTHER AFFIANT SAYETH NOT.

M

SAMUEL J. DUBBIN

Sworn to and subscribed to before me this 15th day of May, 2001.

Notary Public, At Large

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Affidavit of Samuel J. Dubbin was mailed this 15th day of May, 2001, to the attorneys on the attached service list.

SAMUEL J. DUBBIN
Samuel J. Dubbin, P.A.

Appendix K

UNITED STATES DISTRICT COURT
E.D. NEW YORK

Nos. CV-96-4849(ERK)(MDG),
CV-99-5161, CV-97-461

March 31, 2004

IN RE HOLOCAUST VICTIM
ASSETS LITIGATION

Burt Neuborne, New York University Law School, New York City, *lead class counsel.*

Robert A. Swift, Kohn, Swift & Graft, P.C., Philadelphia, PA, *one of plaintiffs' class counsel.*

Samuel J. Dubbin, Dubbin & Kravetz, LLP, Coral Gables, FL, *for Holocaust Survivors Foundation-USA, Inc.*

William Schwartz, Cadwalader, Wickersham & Taft LLP, New York City, *for Dr. Thomas Weiss.*

Roger M. Witten and Christopher P. Simkins, Wilmer Cutler Pickering, LLP, Washington, DC, *for defendants Credit Suisse and Union Bank of Switzerland.*

MEMORANDUM & ORDER

KORMAN, *Chief Judge*.

I write here to address the outstanding counsel fee request of Samuel J. Dubbin in connection with the settlement of this class action. The background of this case is set forth in *In re Holocaust Victim Assets Litigation*, 105 F.Supp.2d 139 (E.D.N.Y. 2000), and prior discussion of counsel fee requests can be found at *In re Holocaust Victim Assets Litigation*, 270 F.Supp.2d 313 (E.D.N.Y.2002), and *In re Holocaust Victim Assets Litigation*, 302 F.Supp.2d 89 (E.D.N.Y.2004). In a memorandum and order dated March 9, 2004, I explained the scope of the fee application at issue here as follows:

> Two years ago, Mr. Dubbin submitted a fee application that was almost equal to the total amount of legal fees awarded to those counsel who were compensated for their role in obtaining the $1.25 billion settlement with the Swiss banks. Specifically, Mr. Dubbin requested $3.6 million in fees and compensation for himself and an additional award of $2,315,250 for [his then client,] Dr. Thomas Weiss, a founding member of [Holocaust Survivor Foundation–USA]. Mr. Dubbin also sought expenses in the amount of $70,260.87. Of the total $5.9 million that Mr. Dubbin seeks, approximately $3 million is for his efforts on behalf of HSF–USA and its predecessor, the South Florida Holocaust Survivors Coalition, with respect to his objective described in the earlier parts of [my March 9, 2004] opinion—namely, his effort to rectify the allegedly disproportionate sum allocated to survivors in the United States. The remaining $2.9 million, of which Mr. Dubbin seeks [approximately] $600,000 for himself

> and $2.3 million for Dr. Weiss, who was Mr. Dubbin's client, is for services rendered in connection with Dr. Weiss's objection to the releases granted to Swiss insurance carriers as part of the global settlement of all claims against Swiss business entities.

In re Holocaust Victim Assets Litigation, at 116–117 (citations omitted). The figures are now substantially diminished. In my March 9, 2004 decision, I explained my reasons for rejecting the various objections filed by Mr. Dubbin on behalf of Holocaust Survivors Foundation–USA, Inc., (HSF–USA), and I denied outright Mr. Dubbin's fee request as it pertained to allocation issues in this case. *See id.* Shortly thereafter, Dr. Weiss, who has retained new counsel, withdrew in its entirety the $2.3 million fee request that Mr. Dubbin had filed on his behalf. *See* Letter from William Schwartz to Judge Korman, dated March 25, 2004 ("This is to confirm that my client, Dr. Thomas Weiss, has directed me to withdraw his application or petition for compensation in this matter."). Then, as I prepared to issue this opinion, Mr. Dubbin himself sought a reduction in his fee request. *See* Modified Fee Request of Dubbin & Kravetz, LLP, dated March 31, 2004 (hereafter "Modified Fee Request").

Mr. Dubbin continues to seek fees for work performed with respect to the litigation releases provided to Swiss insurance companies in the course of this case. Until today, Mr. Dubbin demanded a lodestar amount of approximately $550,000 in legal fees with an enhancement, and $95,000 in expenses. *See* E-mail from Samuel Dubbin to Burt Neuborne, dated June 14, 2003. Now he requests $309,051 plus expenses of $41,318. *See* Modified Fee Request, at 3. Because of the late timing of his modification, this opinion is written largely in reference to the original numbers. My analysis applies equally to Mr. Dubbin's modified request. Mr. Dubbin claims that

his request is modest in light of the significant time and research that he contributed to the debate over how to treat Swiss insurance companies under the settlement. To the contrary, as I suggested in my opinion of March 9, 2004, *see In re Holocaust Victim Assets Litigation*, at 117–118, the original request was grotesque, and even the modification reflects delusion. Consequently, I now deny outright the remainder of Mr. Dubbin's fee application.

Mr. Dubbin's fee request is based on an extraordinarily inflated view of the importance of his contribution to the resolution of this case. In his original fee application, Mr. Dubbin wrote: "Counsel's clients' objections led to the preservation of the world-wide class of Holocaust Survivors' claims against Swiss insurers, with a minimum value of $100 million." Verified Motion for Attorneys' Fees and Expenses, filed March 15, 2002, at 1 (hereafter "Fees Motion"). Notwithstanding this accomplishment, which is alleged to justify the fee request at issue here, Mr. Dubbin filed a notice of appeal on behalf of Dr. Weiss in an unsuccessful attempt to extort a significant cash award from the settlement fund. As I will explain, I rejected that attempt and I reject Mr. Dubbin's fee application. Before addressing in detail his fee request, I explain what actually took place leading to "the preservation of the world-wide class of Holocaust Survivors' claims against Swiss insurers." When viewed against this background, the absurdity of Mr. Dubbin's fee application becomes apparent.

Background

In 1998, I participated in the negotiations that led to the Settlement Agreement in this case, and I am aware that both sides were committed to achieving a global set-

tlement that was fair and complete. The primary focus was on defining the five principal classes of plaintiffs as delineated in the Settlement Agreement—the Deposited Assets Class, the Looted Assets Class, Slave Labor I, Slave Labor II, and the Refugee Class—and arriving at an acceptable sum of money for which to settle. But equally important was deciding what entities should be released from future liability. As a general matter, the settlement sought to release all businesses "where at least 25 percent of the outstanding stock is owned by a Swiss company." *In re Holocaust Victim Assets Litig.*, 105 F.Supp.2d. at 160. Without explicitly identifying them, the Settlement Agreement thus proposed to release Swiss insurance companies. The parties were conscious of this and specifically excluded from these releases three Swiss insurance companies—Basler Lebens-Versicherungs-Gesellschaft, Zurich Lebensversicherungs-Gesellschaft, and Winterthur Lebensversicherungs Gesellschaft—against which litigation was pending in the United States. They were excluded "to the extent of insurance claims of the type asserted in *Cornell, et al. v. Assicurazioni Generali S.p.A.*, 97 Civ. 2262 (S.D.N.Y.)." Settlement Agreement, Section 1, Definitions.

The initial decision to release all Swiss businesses—except for three named Swiss insurance companies—from future liability was based on practical considerations. A global settlement was the only way the defendants would agree to a $1.25 billion settlement, and when it became apparent that such a settlement would include Swiss insurance companies, plaintiffs' counsel considered their options. None of the released insurance companies were subject to personal jurisdiction in the United States. And because bringing suit elsewhere was not a realistic option, plaintiffs' counsel concluded that they were giving up essentially nothing

by agreeing to the releases. In the context of a $1.25 billion settlement, plaintiffs' counsel decided that agreeing to the exchange brought substantially more benefit to victims of Nazi persecution than could have been achieved by litigation.

After the Settlement Agreement was consummated, I began to disseminate notice in May 1999. The notice plan I employed was extensive and is described in *In re Holocaust Victim Assets Litigation*, 105 F.Supp.2d. at 144–45. Among the most critical aspects of the notice plan was designing a way for class members and other interested parties to raise objections to the Settlement Agreement. I ordered that all objections from interested parties be filed in writing by October 22, 1999. *See* Order, dated May 10, 1999. Then, on November 29, 1999, I would hold a fairness hearing where objectors and other interested parties could voice their concerns. *Id.*

Before the October 22, 1999 deadline, I received approximately 200 written comments and objections to the Settlement Agreement. Only one concerned the release of Swiss insurance companies. That objection, dated October 20, 1999, was filed by Washington State Insurance Commissioner Deborah Senn. *See* Partial Objection of Washington State Insurance Commissioner Deborah Senn to Class Action Settlement (hereafter "Senn Objection"). Commissioner Senn recognized that she was not a part of the class of plaintiffs but moved for leave to object on the grounds that she "believe[d] that insurance claims involving all Swiss insurers and reinsurers, and not just these three named companies [that were excluded from the releases], should be handled by the existing International Commission on Holocaust Era Insurance Claims." Motion of Washington State Insurance Commissioner Deborah Senn to file Partial Objec-

tion to Class Action Settlement, at 1–2. The International Commission on Holocaust Era Insurance Claims (ICHEIC) was established in 1998 after negotiations among the World Jewish Restitution Organization (WJRO), United States insurance regulators, and several European insurance companies. *See generally www.icheic.org*. It was designed to provide Holocaust survivors and their heirs with a way to identify and obtain payment for insurance claims never paid in the wake of the Holocaust. It works closely with the German Foundation "Remembrance, Responsibility, and the Future" (hereafter "the German Foundation"), which administers a $5 billion fund established in 1999 to provide money for claimants against German companies, including insurance companies.

Commissioner Senn made two basic objections. She summarized the first point of her argument as follows:

> The proposed settlement is unfair to insurance policyholders and beneficiaries. It releases all claims against all Swiss insurers and reinsurers (except only Winterthur, Basler Lebens and Zurich). There has been no public review of their records to determine their unpaid Holocaust policies or their value. These companies may be released from many millions of dollars of wrongfully unpaid claims in exchange for relatively *de minimis* payments to policyholders or their heirs. Class members are required to decide whether to opt out of the class without even being told whether they or a family member were covered by policies or the face amount of such policies, although this information may be in the possession of the settling companies. The proposed settlement undermines the International Commission on Holocaust Era Insurance

> Claims whose protocols provide identification, valuation and payment of policies.

Senn Objection, at 1–2. Her second claim was that,

> [t]he settlement notice is inadequate. It does not provide notice of the specific insurance companies whose polices are covered by the release. It does not inform class members that participation in the settlement would preclude them [from] recovering on insurance policies through ICHEIC. And perhaps most egregiously, the notice and glossary largely conceal from all but the most careful reader that insurance policy claims are even subject to the settlement and release.

Id. at 2. In other words, Commissioner Senn maintained that the Settlement Agreement "creates a substantial possibility that class members will unintentionally and unknowingly release insurance claims of substantial value." *Id.* at 7. Again, Commissioner Senn's objection was the *only* objection received in a timely fashion that dealt with the insurance releases. Mr. Dubbin submitted nothing.

Subsequently, on November 18, 1999, Lawrence Eagleburger, the Chairman of ICHEIC, submitted a letter echoing the sentiments of Commissioner Senn. *See* Letter from Lawrence Eagleburger to Judge Korman, dated November 18, 1999. He explained that "ICHEIC has established a claims process for the payment of unpaid Holocaust-era insurance claims." *Id.* at 1. He continued:

> We are attempting to persuade all companies with Holocaust-era liabilities to join ICHEIC in order to provide as comprehensive a mechanism as possible for resolving unpaid insurance policies. Accord-

> ingly, the Swiss Life Group, along with some other companies, was invited to join the Commission in June 1999. Thus far, they have not responded.
>
> Under the settlement agreement as now proposed, Swiss insurance companies which are not participating in the ICHEIC process will be relieved of any Holocaust-era obligations, while those which are being cooperative will not be released. This anomalous result would appear to be manifestly unfair to the very people we are trying to help: those with legitimate claims.

Id. at 2. While the thrust of the Senn and Eagleburger objections was on maintaining the ongoing viability of ICHEIC—something not ultimately relevant to the decision to amend the Settlement Agreement—they caused me to focus on the validity of the insurance releases.

Not until one more week had passed (and only five days remained until the fairness hearing) did I receive anything from either Mr. Dubbin or his client, Dr. Weiss. Specifically, on November 24, 1999, I received a letter via fax from Dr. Weiss, which stated, in its entirety:

> Dear Judge Korman,
>
> It was brought to my attention that the Swiss bank settlement of $1.25 billion releases the Swiss insurance companies, except for the three companies named in the class action lawsuit, from any further liability. *This is completely unacceptable, as many Swiss insurance companies acted as cloaking agents for Munich [Reinsurance] of Germany during WWII.* U.S. military and intelligence/legal documents from 1944–47 state this explicitly and charge Munich Re: with criminal activity. Additionally, this surreptitious inclusion of these companies is not known to the general survivor community. Your

assistance to remove this inappropriate blanket amnesty for the Swiss insurance industry is vital.

The Bergier report states that the amount that the Swiss owe regarding stolen WWII gold may exceed six billion dollars. The documents further state that although the Swiss banking industry stopped receiving gold at a point before the end of the war (as a result of Treasury Secretary Henry Morganthau's admonition that there will be a day of reckoning) the Swiss insurance industry continued receiving stolen gold up to the last days of the war. Justice demands that the Swiss insurance industry not escape its responsibility.

Sincerely,

Thomas Weiss, MD

Letter from Thomas Weiss to Judge Korman, dated November 24, 1999 (emphasis added). This letter was the only written submission I received from either Mr. Dubbin or Dr. Weiss in advance of the fairness hearing, and it was more than thirty days after the deadline for submitting written objections had passed. The letter itself stated little more than a general notion that the insurance companies had done wrong and that releasing them was therefore inappropriate. More to the point, the letter did not address the actual defect in the insurance releases, focusing instead on the extent to which Swiss insurance companies engaged in cloaking assets. Whether a company cloaked—that is, hid—assets on behalf of the Nazis is wholly irrelevant to a claimant who is seeking to recover from an insurance company for a policy once held by a victim of Nazi persecution. Moreover, to the extent that it dealt with Swiss insurance companies' dealing with Nazi gold, it could only be relevant to a Looted Assets claim, which, as I have

explained, could never have survived a motion to dismiss. *See In re Holocaust Victim Assets Litig.*, at 93–94; *see also In re Holocaust Victim Assets Litig.*, 14 Fed.Appx. 132, 134 (2d Cir.2001) (stating that looted assets claims were "based on novel and untested legal theories of liability, would have been very difficult to prove at trial, and will be very difficult to accurately valuate"). It is with these submissions that I approached the fairness hearing.

Many people spoke at the fairness hearing, including survivors, attorneys, and interested members of the community. Early in the day, Roman Kent, a Holocaust survivor and Chairman of the Board of the American Gathering of Jewish Holocaust Survivors, spoke. He commended the settlement but added that, "under no circumstances [should] this settlement TTT give what I call a one-way street to heaven to the insurance companies." Fairness Hearing Transcript, at 23. He continued: "The insurance companies are subject to the International Committee of Insurances, which is chaired by [Lawrence Eagleburger], and they should not get a blank, what you can call maybe legal closure, whatever it is, because they should be subject to the international insurance claims." *Id.* Mr. Dubbin spoke later and added little. But he was not alone. Two more lawyers, first Mark Dunaevsky and later Norman Rosenbaum, followed Mr. Dubbin and once again echoed the same concerns. *See id.* at 88–91, 175. Neither of these lawyers sought a fee. In any event, I turn now to Mr. Dubbin's testimony.

Mr. Dubbin explained his purpose as follows:

> My specific point today is to address one aspect of the settlement in particular, and that is the extent to which the settlement purports to release an infinite

> number of unnamed Swiss companies, particularly insurance companies, other than those which are enumerated in the settlement agreement as being involved with the International Commission on Insurance Claims.

Fairness Hearing Transcript, at 62. First, Mr. Dubbin's description of the Settlement Agreement was incorrect and reflected both his general lack of familiarity with the Settlement Agreement and his ill-prepared presentation. As I explained earlier, the Settlement Agreement specifically excluded certain insurance companies from its definition of Releasee, but not those that Mr. Dubbin identified. Instead, it named three companies known to be subject to personal jurisdiction—and indeed, facing pending litigation—in the United States. Whether or not they were involved with ICHEIC was irrelevant.

Mr. Dubbin next proceeded to present information concerning German insurance companies that had "used a variety of dummy companies or real companies to cloak their real assets and resources." *Id.* at 63. He explained that Dr. Weiss had done research on this issue and could present documentation as to the extent of such activity. He then described in detail a report from the Office of Military Government for Germany, dated September 1946, that provided an example of such cloaking. But this discussion, too, revealed Mr. Dubbin's misunderstanding of the Settlement Agreement. The Settlement Agreement expressly excluded from its definition of Releasees many (although not all) companies that "disguised the identity value, or ownership of Cloaked Assets or Slave Labor." Settlement Agreement, Section 1. Indeed, Mr. Dubbin now concedes that this provision of the Settlement Agreement "would have prevented a release to companies that are . . . direct corporate descendants of pre–1945 German companies (or com-

panies headquartered in an Axis controlled country) and which also cloaked assets." Response to Neuborne Supple-mental Declaration filed by Samuel J. Dubbin, dated September 5, 2003, at 12 (hereafter "September 5, 2003 Response"). Between this misconception and the more central fact that Mr. Dubbin completely failed to address how the cloaking of Nazi assets would impact beneficiaries to insurance policies and their heirs in their attempt to collect on insurance claims, Mr. Dubbin's complaint was largely beside the point. Indeed, it failed altogether to address the central issue of prejudice suffered by beneficiaries of policies issued by released insurance companies.

Mr. Dubbin concluded his remarks as follows:

> So the question presented by this, and I have other documents here that come to the same basic conclusion, is why a blanket release of unnamed and unidentified companies, which we know from evidence in the archives may well have been beneficiaries of looted Jewish assets through the access in Nazi insurance trusts, without being even identified or held to account in any way, shape or form for what their responsibilities are.
>
> I know that Commissioner Senn in the State of Washington and Chairman Eagleburger have brought this question to the Court's attention. But particularly in light of some of the documents we have found, we felt on behalf of the Florida survivor community and Dr. Weiss in particular, we would urge you—and I know Mr. Neuborne said if we have any problems with the settlement, please bring them to his attention.
>
> I don't know what benefit accrues to survivors from what may be a big surprise at the end of the road,

> when we find out some of the companies not even identified today being released could well be as culpable as some of the ones who we've been talking about all these years. Thank you very much.

Fairness Hearing Transcript, at 65–66. This testimony is the sum total of Mr. Dubbin's contribution to my consideration of the insurance releases. It utilized his client's research to repeat and elaborate on the letter his client had sent me a week earlier. The testimony focused on looted assets and added nothing to the legal arguments that Commissioner Senn had already advanced in a timely fashion. Nor did it raise the valid legal claim that troubled me the most and that ultimately compelled me to direct the renegotiation of the insurance releases.

Directly after the fairness hearing, concerns that had been brewing led me to call a conference with the parties. After the parties had a time to prepare, we held a conference on December 22, 1999, some three weeks after the fairness hearing. One of the purposes of the meeting, as recorded by Deputy Special Master Shari Reig, was to "discuss[ ] the two key issues that Judge Korman has made it clear he wants to resolve prior to ruling on the fairness of the settlement—art and insurance." Memorandum from Shari C. Reig to Judah Gribetz, dated December 27, 1999. In the end, I insisted that the insurance releases be renegotiated not because Swiss insurance companies had cloaked assets or engaged in other wrongdoing unrelated to avoiding payment of insurance policies issued to victims of Nazi persecution. Rather, I was concerned with the straightforward legal point that, as originally drafted, the insurance releases were unenforceable because Swiss insurance companies were released from claims by beneficiaries or heirs who were not receiving any direct and distinct benefit for these releases. In addition, these

potential claimants were not adequately informed that their claims were being released. In granting the releases, the parties had implicitly recognized that, because of the lack of personal jurisdiction over these companies and the difficulties that would have almost certainly prevented successful lawsuits anywhere else, the releases were essentially worthless and unenforceable. Nevertheless, as a legal matter, they were claims that could not be signed away without some *quid pro quo*. *See National Super Spuds, Inc. v. New York Mercantile Exchange*, 660 F.2d 9 (2d Cir.1981). Or, as Mr. Dubbin put it for the first time in defending his fee application (four years after the fairness hearing):

> In *National Super Spuds, Inc. v. New York Mercantile Exchange*, 660 F.2d 9 (2d Cir.1981), the Second Circuit squarely rejected the argument that it would acceptable for a federal court to approve a settlement that compromised some claims for no consideration because a subsequent court might refuse to enforce the release language due to its invalidity. The settlement negotiators in *Super Spuds* urged the Court to approve a class settlement that released certain claims for no consideration because the state court where the released claims might later be pressed could decide whether the federal class action release was in fact valid. The Second Circuit did not agree: "A federal court should determine for itself whether it has that power and may properly exercise it, not pass over the question because a state court may assume the unenviable task of deciding that its act was a nullity."

September 5, 2003 Response, at 14. Of course, Mr. Dubbin never made this argument until his fee was at stake, years after the issue of insurance releases had been resolved.

By the time of the December 22, 1999 meeting, I had become convinced that the insurance releases were unenforceable as drafted. Indeed, when I eventually approved the amended settlement, I wrote: "[I]f the carriers do not reaffirm [the amended insurance releases], I will issue a supplemental decision on the enforceability of the original insurance releases." *In re Holocaust Victim Assets Litig.*, 105 F.Supp.2d at 165. I was prepared to hold them unenforceable as violating the consideration requirement of *National Super Spuds*, 660 F.2d 9. This legal defect is why I asked Professor Neuborne to reenter negotiations. It had nothing to do with the five minutes of testimony Mr. Dubbin had presented at the fairness hearing. If any submission is to be credited for opening this reconsideration, it is that of Commissioner Senn, who in a *timely fashion* pointed out that there was a problem with the "*de minimis*" return class members were going to receive from the insurance releases and the general insufficiency of the notice.

Six weeks after I had directed Professor Neuborne to renegotiate the insurance releases, and a full three months after it was due, Mr. Dubbin filed a written objection to the Settlement Agreement. *See* Objection of South Florida Holocaust Survivors Coalition and Thomas Weiss, M.S., dated January 31, 2000 (hereafter "Settlement Agreement Objection"). There is no suggestion that Mr. Dubbin was unaware of the filing deadlines or otherwise prevented from submitting a timely filing. To the contrary, on October 21, 1999, he had written to Special Master Judah Gribetz and stated that he and his clients "understand that objections to the overall settlement are due on October 22." Letter from Samuel J. Dubbin to Judah Gribetz, dated October 21, 1999 (appended to Settlement Agreement Objection). Yet at that time he had not requested additional time to file an

objection; he had simply requested an opportunity to appear at the fairness hearing, which of course, he was given. Mr. Dubbin did not even mention insurance releases as something he wished to address.

Ultimately, Mr. Dubbin's belated objection was of no consequence. It chronicled archival research that Dr. Weiss had uncovered and that purportedly revealed the expansive scope of the Nazi era insurance scandal, with particular reference to insurance companies being used to cloak assets. *See* Settlement Agreement Objection. In the context of the Settlement Agreement, this research was largely beside the point. At core, Mr. Dubbin's objection made three arguments:

> This filing addresses three substantial reasons it would be unfair for the Court to approve the blanket release of Swiss insurance companies as now proposed. First, several Swiss insurers were used to cloak the assets of the major Nazi-based insurance companies, Allianz and Munich Reinsurance. No one knows today which releasees might be responsible for portions of hundreds of thou-sands of insurance policies or other Jewish assets that were successfully cloaked by Allianz and Munich Re within Swiss companies. Second, these transfers and cloaking efforts were designed to conceal a massive German insurance and reinsurance juggernaut which grew to dominate the European insurance market by virtue of the Nazi oppression and economic power. The key was the invisible reinsurance market, through which the Nazis controlled insurers and thereby business and finance throughout Europe. As one important Allied Report noted, the insurance business was regarded as 'the handmaiden of German industrial expansion in occupied countries.' Third, Swiss insurers profited directly and hand-

> somely from the German insurance market during World War II. They also profited from gold looted by the Nazis from Jews and other victims.

Settlement Agreement Objection, at 6–7. That Swiss insurance companies had engaged in wrongdoing was never in dispute. But to the extent that this wrongdoing consisted of cloaking assets, there could be no legal liability without some showing that cloaking of assets in some way prejudiced the ability of insurance policy beneficiaries to collect. The only issue that was in dispute was what should be done about Swiss insurance companies that were not subject to personal jurisdiction in the United States and against which claims could be made for insurance policies issued to victims of the Holocaust. In the course of his objection, Mr. Dubbin did not even quote the definition of Releasees. Nor did he account for the exclusion of certain insurance companies that had engaged in cloaking assets. Indeed, although he wrote in his objection that "[t]he central question concerning the present releases is the extent to which Swiss insurers who would be released are, in reality, direct economic descendants of the Nazi insurance and reinsurance empire which deprived hundreds of thousands of Holocaust victims of their insurance moneys," *see id.* at 20, he conceded years later that the definition of Releasees "would have prevented a release to companies that are TTT direct corporate descendants of pre–1945 German companies (or companies headquartered in an Axis controlled country) and which also cloaked assets." September 5, 2003 Response, at 12.

The likely reason that Mr. Dubbin's objection was not narrowly tailored to the Settlement Agreement in this case is that it was based on research his client had done in preparing for a separate litigation. Since 1998, Mr. Dubbin had represented Dr. Weiss in a multi-district lit-

igation case pending in the Southern District of New York in which Dr. Weiss was suing an Italian insurance company, Assicurzaioni Generali, S.p.A., for recovery on an insurance policy purchased by his father prior to World War II. Mr. Dubbin summarized the work that Dr. Weiss had done:

> By early 1998, Dr. Weiss had begun to conduct and commission private research from various archival and academic sources, including the U.S. National Archives in Washington, D.C.; European archives; specialized repositories of information such as the College of Insurance in New York City; Yad Vashem (the Holocaust Memorial Museum in Jerusalem); and other sources; as well as to consult at length with insurance experts such as Professor Joseph Belth, Professor Emeritus of Insurance at Indiana University. At considerable personal expense in time and money, Dr. Weiss retrieved and analyzed thousands of pages of archival records, most of which described decades-old business transactions in the lexicon of the early and mid–20th Century. The Florida Survivor's written Objections and later filings with the Court reflect many of the countless hours Counsel and Dr. Weiss spent scouring, digesting, analyzing, and discussing those materials.

Fees Motion, at 15. At my request, Mr. Dubbin provided me with copies of several of his filings in the *Generali* case, and they are substantial. These, in conjunction with the Settlement Agreement Objection, reveal that Dr. Weiss had indeed performed research regarding not only the insurance policy belonging to Dr. Weiss's father, but also the practice of Nazi era insurers and reinsurers in general. Nevertheless, that research has had no impact

on this case. Or, as Professor Neuborne has written, "the work was unnecessary." Supplemental Neuborne Declaration, at 10. Dr. Weiss, who performed the research but withdrew his compensation request, has apparently come to recognize this. Mr. Dubbin has not.

In any event, the negotiations that recommenced in mid-December 1999 continued for some months. Mr. Dubbin argues that, even if his belated written objection played no role in the decision to reassess the issue of claims to life insurance policies, he should be compensated for it because he was not made aware of the negotiations until April 2000. *See* September 5, 2003 Response, at 10–11. It would be a different matter if Mr. Dubbin had gone to the time and effort to file his objection in a timely fashion. If the objection had any merit, then it might be unfair to deny him a fee because he could have been working on the assumption that a written objection was necessary. Here, his written objection was filed three months late and two months after other more pertinent objections had been raised. He could make no assumptions. Indeed, the best that he could have hoped for was that his written submission would not be rejected as untimely.

Mr. Dubbin also complains of not being invited to join the negotiations. Mr. Dubbin claims that immediately after learning of the negotiations, he wrote to both parties seeking a chance to participate. *See* Letter from Samuel J. Dubbin to Professor Neuborne and Mark Kahn, dated April 10, 2000. Though Professor Neuborne contends that Mr. Dubbin was in fact alerted long before of the existence of negotiations, *see* Supplemental Neuborne Declaration, at 10, this debate is irrelevant as Mr. Dubbin has never suggested that he was affirmatively misled on this score. Professor Neuborne

responded to Mr. Dubbin's request on May 12, 2000 by writing:

> I sympathize with your desire to play a more significant role in this case. Unfortunately, no complex class action can open the negotiation process to every lawyer who asserts expertise and interest. Your concerns with the original insurance releases were widely shared, and have been the subject of discussion between and among highly skilled counsel for many months. I can assure you that whatever potential settlement emerges from the ongoing insurance discussions, your clients will have a full opportunity to opt out of any insurance agreement with which they disagree, without jeopardizing their other rights under the basic settlement agreement. I can also assure you that any agreement that emerges will be subject to notice, public comment, and a full hearing before the Court under Rule 23(e).

Letter from Professor Neuborne to Mr. Dubbin, dated May 12, 2000.

In May 2000, after considerable negotiations, the parties (without Mr. Dubbin's involvement) were able to agree on acceptable language for an amendment to the Settlement Agreement concerning the releases given to Swiss insurance companies. In approving the amended Settlement Agreement, I described the development as follows:

> In connection with the fairness hearings, I received several well-taken objections to the inclusion of insurers as 'Releasees' under the Settlement Agreement. The objections related to the effectiveness of notice as to claims against released Swiss insurers and the appropriateness of releasing such insurers in the absence of a mechanism to pay valid Holocaust-

> related insurance claims as part of the distribution of the settlement fund.

In re Holocaust Victim Assets Litig., 105 F.Supp.2d at 160. Mr. Dubbin appears to argue that my three words, "well-taken objections," entitle him to a fee. *See* Fees Motion, at 18. I disagree. If this language caused Mr. Dubbin to assume that his was one of the "well-taken objections" that I credited with bringing about the amended insurance releases, then I painted with too broad a brush. If any objection merited credit it was that of Commissioner Senn, which was filed in a timely fashion and at least alluded to one of the ultimate defects in the releases. Mr. Dubbin, of course, adopted by reference her objection and the related objection of Chairman Eagleburger when speaking at the fairness hearing. In any event, I continued:

> [T]he parties and major Swiss insurers released under the Settlement Agreement, after extensive discussions, have agreed on a mechanism to evaluate and pay Holocaust-related insurance claims. The mechanism, set forth in Article 4 of Amendment 2 to the Settlement Agreement, specifically designates up to $100 million (including up to an additional $50 million provided by the insurers themselves) for the resolution of unpaid insurance claims. The mechanism provides for prompt and fair consideration of all insurance claims, appropriate multipliers for such claims, full cooperation of the participating insurers in providing relevant documentary material to potential claimants (subject to monitoring by the Swiss insurance supervisor) and assurance of payment from the settling defendants. The amendment also contains a provision that acknowledges my power to order participating insurers to disclose the

> holders of policies, with the consequence of an insurer's failure to comply being the exclusion of such insurer from all provisions of the Settlement Agreement. My power to order such disclosure is subject to the application of certain standards that are not inconsistent with the good faith duty of a releasee to make disclosures necessary to permit class beneficiaries to obtain the benefits of the Settlement Agreement. The details of the insurance claims mechanism and the list of participating released insurers will be part of the notice of the proposed plan of allocation and distribution, and class members will have an opportunity to opt out of the insurance provisions of Amendment 2.

Id. (internal citation removed). Under the circumstances, the amendment to the Settlement Agreement alleviated my concerns about the insurance releases. I wrote:

> I find that the insurance provisions of Amendment 2 are fair and reasonable, and adequately address the concerns raised in the objections submitted in connection with the fairness hearings. Accordingly, they merit approval as part of the settlement. In reaching this decision, I have considered all of the relevant factors and circumstances, including the status of insurers as releasees under the Settlement Agreement, the addition of up to $50 million to the settlement amount and the unavailability of a superior mechanism for the payment of Holocaust-related claims involving such insurers. I have also relied upon the following representations by the participating insurance carriers: (i) the amount of unpaid 'Policy Claims' under Amendment 2 is not likely to exceed $100 million in the aggregate (including multipliers) and (ii) most of the partici-

> pating insurance carriers have reasonably complete surviving documentation that will permit them (and the settlement's insurance claims mechanism contemplated by Amendment 2) to provide fair and efficient consideration of all claims.

Id.

After I had approved the fairness of the amended Settlement Agreement, Mr. Dubbin wrote a letter outlining alleged deficiencies in the Settlement Agreement as it pertained to insurance companies. *See* Letter from Samuel Dubbin to Judge Korman, dated September 1, 2000 (appended to Declaration of Samuel J. Dubbin, dated March 31, 2004). Shortly thereafter, Mr. Dubbin informed me (either directly or through Professor Neuborne) of his intent to file a notice of appeal from my judgment on behalf of Dr. Weiss. Mr. Dubbin asked if I would speak with Dr. Weiss in advance of any notice of appeal, and ultimately, a telephone conference was held between myself, Mr. Dubbin, Dr. Weiss, and Professor Neuborne. That conference is described briefly in my March 9, 2004 memorandum and order, *see In re Holocaust Victim Assets Litig.*, at 117–118. I explained to Mr. Dubbin and Dr. Weiss that their proposed appeal was without merit and I attempted to convince them that filing a notice of appeal could only harm the class. They were unconvinced. More important for the purpose of this opinion, at the meeting they revealed their true colors. After the discussion appeared to be going nowhere, Dr. Weiss asked how much I would pay to prevent them from filing a notice of appeal. Specifically, he wanted me to provide attorneys fees and funds for private research that would assist him in his litigation against Generali. This was beyond the pale. I was not going to be blackmailed, particularly with funds that belong to

Holocaust survivors. Professor Neuborne described the incident more diplomatically as follows:

> Any person familiar with class action litigation will understand that Mr. Dubbin's tactic in filing the appeal was an effort to play 'hold-up,' by placing a legal obstacle in the path of the settlement's administration that could be removed by acceding to his client's financial demands. In fact, his client attempted to extract funds from the settlement class to fund a Holocaust-related research institution that he would head.

Affirmation of Professor Neuborne, dated February 18, 2004. Any doubt that this was an attempted "hold-up" is eliminated by comparing the glowing description of the amended Settlement Agreement contained in Mr. Dubbin's fee application with what came next.

On September 7, 2000, Mr. Dubbin filed, on behalf of Dr. Weiss, an appeal from the judgment approving the amended Settlement Agreement. Eventually, Mr. Dubbin would withdraw the appeal without ever filing a brief. Professor Neuborne placed this in context: "When [months later] the Court refused even to appear to bargain over the withdrawal of the appeal, and I adamantly refused to engage in negotiations, Mr. Dubbin unconditionally withdrew the appeal filed on behalf of Dr. Weiss without ever making a serious effort to prosecute it." *Id.* Though Mr. Dubbin contends that this appeal produced concrete results, *see* Fees Motion, at 62–63 (citing Letter from Professor Neuborne to Mr. Dubbin, dated May 15, 2001), I disagree. It certainly did not change anything with respect to Swiss insurance companies. Regardless, other appeals remained, and not until July 26, 2001 did the Second Circuit affirm my decision,

allowing distribution to begin. *See In re Holocaust Victim Assets Litig.*, 14 Fed. Appx. 132 (2d Cir.2001).

To recap, this is what Mr. Dubbin did in connection with the renegotiation of the releases of Swiss insurance companies in this case: First, he submitted nothing prior to the deadline for written objections to the Settlement Agreement and nothing prior to the fairness hearing. Second, Mr. Dubbin spoke briefly at the fairness hearing repeating the sentiments and research of his client, expressing his approval of objections that had been filed in a timely matter by other individuals, and adding his concern that many Swiss insurance companies engaged in cloaking assets. Third, Mr. Dubbin filed a largely irrelevant written objection based on research by his client three months late and six weeks after I had decided that the insurance releases were unenforceable. Fourth, Mr. Dubbin stood by as his client attempted to extort a significant cash award from a fund belonging to Holocaust survivors in exchange for not filing a notice of appeal from my judgment approving the fairness of the settlement. And fifth, Mr. Dubbin filed that notice of appeal. For this, he initially sought $600,000, and now seeks $309,051 in fees plus $41,318 in disbursements.

Discussion

Not all work is entitled to be compensated, even when that work is done in the context of a lawsuit. In this case, Mr. Dubbin is seeking payment from the settlement fund under "the common fund doctrine."

> The common fund doctrine allows a court to distribute attorney's fees from the common fund that is created for the satisfaction of class members' claims when a class action reaches settlement or judgment.

> The doctrine is grounded in the principles of quantum meruit and unjust enrichment, in two senses. First, the doctrine prevents unjust enrichment of absent members of the class at the expense of the attorneys. It is meant to compensate the attorneys in proportion to the benefit they have obtained for the entire class (the fund), not just the representative members with whom they have contracted. Second, the doctrine prevents the unjust enrichment of absent class members at the expense of the class representatives. In the absence of the doctrine, only the present members, who hired the attorneys, would have to pay attorney's fees, while all the members, both absent and present, would enjoy the benefits of the settlement or judgment. The members who did not hire the attorneys would be unjustly enriched at the expense of those who did.

Newberg on Class Actions, § 14.6 (4th ed.2002). The Second Circuit has stated that in common fund cases, "a fee award should be assessed based on scrutiny of the unique circumstances of each case, and a jealous regard to the rights of those who are interested in the fund." *Goldberger v. Integrated Resources, Inc.*, 209 F.3d 43, 53 (2d Cir.2000). More important for this case, the common fund doctrine presumes that, if attorneys' fees are to be paid from the fund, it will be because some benefit— be it monetary or otherwise—was conferred on the class by virtue of the attorney's work. After all, "[t]hose who receive no benefit from the lawyer's work should not be required to pay for it." *Van Gemert v. Boeing, Co.*, 573 F.2d 733, 736 (2d Cir.1978). Mr. Dubbin himself wrote that "a paramount consideration for awarding fees to an objector is the benefit to the class, [and] it is only appropriate that the amount of the fee award bear a rea-

sonable relationship to the benefit conferred by virtue of the objections." Fees Motion, at 41.

Mr. Dubbin claims that his work in response to the proposed releases "led to the preservation of the worldwide class of Holocaust Survivors' claims against Swiss insurers, with a minimum value of $100 million." Fees Motion, at 1. Before I address the claim that Mr. Dubbin's work *caused* the renegotiation of insurance releases, I turn to Mr. Dubbin's claim that the amendment to the Settlement Agreement as it related to insurance companies was worth $100 million. Mr. Dubbin has written that, "[i]n approving the modified Settlement, the Court estimated the value of potential claims against Swiss insurers to be $100 million." *Id.* at 4. That is inaccurate. In my memorandum and order approving the amended settlement, I explained that the amendment of the Settlement Agreement relating to insurance companies created a means for claimants to seek money for unpaid insurance claims. I then wrote: "The mechanism, set forth in Article 4 of Amendment 2 to the Settlement Agreement, specifically designates up to $100 million (including up to an additional $50 million provided by the insurers themselves) for the resolution of unpaid insurance claims." *In re Holocaust Victim Assets Litig.*, 105 F.Supp.2d at 160. This was not an estimate of value; it was a description of the mechanism of distribution. The $100 million figure was a cap on payments, and it was set as a figure that the parties knew was far higher than any reasonable estimate of claims. Indeed, only two Swiss insurance companies ultimately agreed to the conditions necessary to be granted a release. The Special Master's Interim Report on Distribution and Recommendation for Allocation of Excess and Possible Unclaimed Residual Funds, (hereafter "Interim Report"), explained: "In a document dated July 26, 2001, the par-

ties entered into an agreement to process insurance claims for policies issued by the Swiss insurers Swiss Re and Swiss Life. No other Swiss insurers will receive releases in connection with this litigation" with respect to their duty to beneficiaries of insurance policies. Interim Report, at 106. As of June 30, 2003, only 1,238 claims to insurance policies had been submitted and found eligible for processing. *See id.*, at 108–9. Of the claims that have been specifically researched by insurance companies, most have been referred to the German Foundation Initiative for possible payment from the $5 billion fund it created. *Id.* at 109.

Mr. Dubbin alternatively contends that I am bound to value the aspect of the amendment to the Settlement Agreement that relates to insurance companies based on the total potential value to the class. *See* Sept. 5, 2003 Response, at 22 n. 26 (citing Newberg on Class Actions, at § 11–29; *Boeing Co. v. Van Gemert*, 444 U.S. 472, 100 S.Ct. 745, 62 L.Ed.2d 676 (1980); *Waters v. Int'l Precious Metals Corp.*, 190 F.3d 1291 (11th Cir.1999)). He claims that because the potential added value was $100 million—in fact, it was only $50 million in "new money," *see* Letter from Samuel Dubbin to Judge Korman, dated September 1, 2000, at 5—this is the relevant value for awarding his fee. Mr. Dubbin is wrong. The cases he cites *allow* a court to treat the potential value to the class as the relevant value for measuring attorneys fees, but they do not require it. Meanwhile, to the extent that Mr. Dubbin claims that the amendment added value because it made clear that insurance companies which did not participate in the distribution mechanism would not be released, Professor Neuborne accurately described the value of this narrowing as follows:

> Assuming that the narrowing of the insurance releases permits a Holocaust victim to sue a Swiss

> insurance company, the actual economic value of such a claim appears quite modest. Insurance policies issued by Swiss companies in the German market are already covered by the German Foundation and by ICHEIC. My research indicates that virtually all Swiss-market policies have been paid. Thus, the insurance policy exposure appears to be for Swiss companies doing business in Europe, other than in Germany. While such potential liability may be significant, there is no reliable basis for assessing its economic value. Moreover, none of the originally released Swiss insurance companies appear to be within the *in personam* jurisdiction of a United States Court. The three Swiss insurance companies that appeared to be within the *in personam* jurisdiction of an American court had already been carved out of any insurance release. I know of no foreign tribunal in which such claims can be pressed effectively. Swiss pleading law makes it virtually impossible to use Swiss courts.

Supplemental Neuborne Declaration, dated July 21, 2003, at 8. This estimate is more realistic, and more tied to possible legal recovery, than the estimate of value provided by Mr. Dubbin's expert in today's belated and untimely filing. *See* Modified Fee Request, at ¶¶ 12–15. Indeed, Mr. Dubbin's expert fails entirely to address the practical reality that it was impossible for beneficiaries and their heirs to sue and recover against the companies that were no longer released. Professor Neuborne recognized that there was *some* value added by the amendment to the Settlement Agreement as it related to insurance companies, but concluded that it was "quite modest, and unlikely to yield more than several million dollars in recoveries." *Id.* at 9. In retrospect, with only

two participating companies, even this has proved to be optimistic.

In any event, the precise value of the amendment regarding insurance companies is immaterial because Mr. Dubbin did not contribute to the amendment. Again, to be rewarded fees from a common fund as compensation for conferring a material benefit on the class, an individual must have actually done the work that led to the material benefit. *See Savoie v. Merchants Bank*, 84 F.3d 52, 56–57 (2d Cir.1996) (stating that "the district court must determine whether plaintiff's suit was a substantial cause of the benefit obtained."); *Savoie v. Merchants Bank*, 166 F.3d 456, 463 (2d Cir.1999) (affirming district court's denial of fees for work not "pursuing the interests of the class"); *Kaplan v. Rand*, 192 F.3d 60, 69 (2d Cir. 1999). Professor Neuborne described the effect of Mr. Dubbin's efforts as follows:

> Viewed most generously, Mr. Dubbin's efforts were helpful in reassessing the scope of insurance releases involving Swiss insurers who are not subject to *in personam* jurisdiction in the courts of the United States, and in exploring the possibility of inkind health care benefits to members of the plaintiff class. Ufortunately, neither initiative appears likely to confer a material benefit to members of the plaintiff-class.

Second Supplemental Declaration of Burt Neuborne Concerning the Award of Attorneys' Fees, dated April 10, 2002, at ¶ 5. In an earlier decision in this case, I explained at great length my reasons for crediting Professor Neuborne's opinion on the subject of attorneys' contributions to this case and appropriate fee awards. *See In re Holocaust Victim Assets Litig.*, 270 F.Supp.2d at 316–19. I stand by that belief, but I find Professor

Neuborne's assessment of Mr. Dubbin's contribution to be overly generous. Mr. Dubbin cannot be credited at all for the renegotiation of the insurance releases in this case. His work was late, tangential, and ultimately irrelevant. While Mr. Dubbin has submitted timely and impressive work in connection with his fee application, he did not display such attention to his original objections.

Mr. Dubbin has argued that his objections were necessary because Commissioner Senn and Chairman Eagleburger lacked standing to object. *See* September 5, 2003 Response, at 8. He wrote: "In contrast, [my] clients, Dr. Weiss and the South Florida Survivors' Coalition, were the only objectors with standing to object, and who could have appealed an adverse ruling based on flaws in the insurance releases. [My] submission made it impossible for the Court to ignore the issue." *Id.* First, only Dr. Weiss appealed from my judgment approving the settlement. Second, it is hardly clear that either Dr. Weiss or the South Florida Survivors' Coalition had standing. Dr. Weiss's standing cannot be based on his insurance claim involving Generali, an Italian company not released in the settlement. The South Florida Survivors Coalition, meanwhile, never produced evidence of any member with standing. *See In re Holocaust Victim Assets Litig.*, at 114–117. If the only standing of either is based on the fact that Dr. Weiss is the child of Holocaust survivors, he had no greater standing than Roman Kent, a survivor who spoke at the fairness hearing along with Mr. Dubbin. Regardless, even if I concluded that Dr. Weiss or the South Florida Survivors' Coalition did have standing and all other objectors did not, that bare fact would hardly be enough to warrant the $2.9 million in fees initially sought by Mr. Dubbin and Dr. Weiss or even the newly reduced amount of $300,000 sought by

Mr. Dubbin. My own concerns made it impossible for me to ignore the issue—not Mr. Dubbin's belated submission. In a settlement as global and important as this, I was not going to refuse to consider a meritorious objection because the objector lacked standing. *See e.g., In re Holocaust Victim Assets Litig.*, 302 F.Supp.2d 89 (where I considered at great length the meritless arguments and objections of HSF–USA even though I found it did not have standing to object).

Mr. Dubbin has also suggested that were I to find—as I do—that his work made no contribution, it would be tantamount to breaking a promise. This argument is baseless. Mr. Dubbin relies on various statements by Professor Neuborne, not by me. On May 15, 2001, for example, Professor Neuborne wrote to Mr. Dubbin, "I have been impressed with the intensity of Dr. Tom Weiss's interest and the value of his contributions in this case." Letter from Professor Neuborne to Mr. Dubbin, dated May 15, 2001, at 2. Mr. Dubbin, of course, is not entitled to be compensated for his client's contributions. Unlike the usual case in which a lawyer performs the work, here it is uncontested that it was Dr. Weiss who did all of the research and the lawyer who added little (notwithstanding the statements of support by Dr. Weiss). Regardless, Mr. Dubbin also claims that when I met with him and Professor Neuborne in April 2001, Professor Neuborne stated that Mr. Dubbin's objections were "the first and most influential on the issue of the insurance releases," and "Sam [Dubbin's] filing . . . held our feet to the fire." September 5, 2003 Response, at 9. The record clearly shows that the objection Mr. Dubbin filed on behalf of Dr. Weiss and the South Florida Holocaust Survivors Coalition was not "the first" or "the most influential" of the objections on the issue of insurance releases. And the quality and content of Mr. Dub-

bin's legal work, if any, acted as a flame retardant. Moreover, whatever Professor Neuborne may have said in an apparent effort to placate Mr. Dubbin, who was then appealing the fairness of the Settlement Agreement and the method of allocating funds to needy members of the Looted Assets Class, is irrelevant to my consideration of what impact Mr. Dubbin's work actually had on the renegotiation of insurance releases in this case. Passing over whether Professor Neuborne in fact made these two remarks, I am not moved from my position.

Mr. Dubbin similarly claims that after meeting with me and Professor Neuborne, "it was understood that [he] would be compensated initially for all of [his] time expended on the insurance issues." September 5, 2003 Response, at 2. I frankly do not know on what basis Mr. Dubbin "understood' this. I always regarded the Dubbin/Weiss fee application as an outrage, and Mr. Dubbin knew it. Moreover, I could not possibly have agreed to compensate him "for all of [his] time expended on the insurance issues" without knowing how much time that was. I never made any commitments to Mr. Dubbin, and if Professor Neuborne led him to believe that some compensation for time spent on insurance claims would be forthcoming, such statements were clearly not binding on me. Nor could they have prejudiced Mr. Dubbin, who seems to think that he did me a favor by breaking out the lodestar attributable to his work on insurance releases from his "hybrid" fee request related to insurance and allocation issues.

Alternatively, Mr. Dubbin argues that Second Circuit law demands that he be compensated because I adopted his objection. He cites for this proposition *White v. Auerbach*, 500 F.2d 822 (2d Cir.1974), a case where the final settlement clearly "embodied alterations urged by appellants in their objections to the first proposal," but where

the extent of the objections' influence on the Judge was "simply not clear" because the judge who presided over the settlement had passed away. *Id.* at 822. This case is easily distinguished, of course, because I am perfectly able to remember what influence Mr. Dubbin's objections had on my decisions and because the amendment to the Settlement Agreement as it related to insurance companies did not "embod[y] alterations urged by" Mr. Dubbin. Indeed, the thrust of his complaints were that Swiss insurance companies cloaked assets or dealt in assets looted by the Nazis, a complaint that had nothing to do with the insurance companies' liability for unpaid policies addressed in the amendment to the Settlement Agreement. The amendment did not affect in any way the releases given to insurance companies as they related to looted or cloaked assets.

Still, Mr. Dubbin relies on the fact that in *Auerbach*, the Second Circuit indicated as follows:

> [T]he case is similar to *Green v. Transitron Electronic Corporation*, 326 F.2d 492, 498–499 (1st Cir.1964), wherein the district court had denied an allowance to an objector's counsel on the ground that the court was aware of the problem prior to the time when the objection was made. The Court of Appeals noted that at the time of the objection 'none of the court's misgivings were a matter of record,' and held that it was 'unfair to counsel when, seeking to protect his client's interest and guided by facts apparent on the record, he spends time and effort to prepare and advance an argument which is openly adopted by the court, but then receives no credit therefor because the court was thinking along that line all the while.' 326 F.2d at 499.

Id. at 829. Again, this case is wholly different. In *Green*, the objections were filed in a timely manner by someone working at the invitation of the court. 326 F.2d at 499. Here, Mr. Dubbin's objections were filed late and on a volunteer basis, and were not specifically adopted. As I explained, I asked Professor Neuborne to renegotiate the insurance releases because of a legal defect in the releases that Mr. Dubbin never raised, not because insurance companies had engaged in more nefarious activity than the parties initially believed. Specifically, as previously observed, it was apparent that the beneficiaries of insurance policies were not receiving any direct benefit for these insurance company releases and that there was not sufficient notice to potential claimants whose relatives may have had insurance policies in Swiss insurance companies. In other words, the beneficiaries of policies were giving up legal rights in exchange for no consideration and without adequate notice on that score. I do not contend that I was "thinking along that line all the while," but I was certainly "thinking along that line" by the time of Mr. Dubbin's late objection that did not even cite to these defects.

Even if I were to find that Mr. Dubbin's work contributed some material benefit to the amendment of the Settlement Agreement, I would not be able to accept his fee request. In May 2002, shortly after Mr. Dubbin filed his initial motion for fees, Robert Swift responded on behalf of the Plaintiffs Executive Committee. *See* Objection to the Verified Motion of Dubbin & Kravetz, LLP for Attorneys' Fees and Reimbursement of Expenses, dated May 13, 2002; Objection to the Verified Motion of Thomas Weiss, M.D. for Attorneys' Fees and Reimbursement of Expenses, dated May 31, 2002. Mr. Swift described Mr. Dubbin's fee request as "shocking," and his filing on behalf of Dr. Weiss as "surreal." *Id.* I agree.

A brief examination of the break-down of Mr. Dubbin's time spent in the insurance releases aspect of this case reveals how outlandish his request was. Mr. Dubbin has argued that "the law does not support the disaggregation of the attorneys' time when the firm's effort produced a material benefit for the class." Sept. 5, 2003, at 14 (citing *Dubin v. E.F. Hutton Group, Inc.*, 878 F.Supp. 616 (S.D.N.Y.1995)). Although I need not address the issue here because there was no "material benefit for the class," I do not I agree with the premise that "disaggregation of the attorneys' time" is inappropriate in the context of this fee application. Accordingly, I proceed to a "disaggregation" of Mr. Dubbin's time.

Again, Mr. Dubbin initially sought a lodestar award of $550,318, $95,000 in expenses, and a lodestar enhancement. Professor Neuborne broke down this request as follows:

> The lodestar, calculated on the basis of a $425 hourly fee that Mr. Dubbin claims to charge in general practice, includes $403,705 attributable to insurance issues at the trial level; $89,250 attributable to insurance aspects of the fairness and allocation appeals pursued by Mr. Dubbin; and $57,163 attributable to responses to objections filed to his materials during the summer of 2000 [though Mr. Dubbin claims that this was in fact for work done in 2002]. Of the $403,705 attributable to insurance issues, Mr. Dubbin estimates that $175,000 is attributable to pursuing the personal insurance claim of his client Dr. Thomas Weiss, against Generali.

Supplemental Neuborne Declaration, at 2. As Professor Neuborne argued, it is hard to see why the settlement class in this case should be asked to pay $175,000 for expenses in connection with Dr. Weiss's claim against

Generali—an Italian insurance company not included in this case or released by the original Settlement Agreement—particularly because the vast bulk of any research was performed by Dr. Weiss himself. Removing that sum reduced the original lodestar to $375,318. Similarly, it is incredible that Mr. Dubbin seeks fees related to his appeal, later withdrawn, from my judgment approving the Settlement Agreement. The ultimately withdrawn appeal, which I have already explained was nothing more than an at-tempted "hold-up" utilizing a challenge to a judgment that he now describes glowingly, accomplished nothing for insurance claimants. Professor Neuborne systematically addressed Mr. Dubbin's charges in connection with appeals, responses to objections in the summer of 2000, and "reconstructed time" for which Mr. Dubbin could not specifically account. *See* Supplemental Neuborne Declaration, at ¶¶ 3–5. The result is a swift reduction of Mr. Dubbin's lodestar to $129,455. I adopt this analysis without repeating it, and it would apply similarly to Mr. Dubbin's modified request. Indeed, Mr. Dubbin himself has now withdrawn his request for compensation for these three categories. *See* Modified Fee Request, at ¶ 4. The only place I differ with Professor Neuborne is in the final analysis. He argues that only 50% of this remaining lodestar reflected work that was necessary or could arguably have created a benefit. As I have explained, the more honest response is that none of Mr. Dubbin's work was necessary or had such an effect.

Part of Mr. Dubbin's rationale for his outlandish fee request is apparently his belief that, "Counsel's intervention on his Clients' behalf was indeed fraught with tremendous economic risk because it challenged the accepted wisdom of the elites of the class action bar, several major Jewish organizations, and the Govern-

ments of the United States and Switzerland." Fees Motion, at 11. But there was no great "risk" here. Mr. Dubbin relied on research that had been done by Dr. Weiss for a separate litigation and converted it into a sloppy and untimely objection in this case. It is as if he had bought one raffle ticket and decided to enter it in a second drawing. That is not risky and does not warrant compensation.

All told, Mr. Dubbin had a hand in submitting two things relevant to the insurance releases in this case: Five minutes of redundant and irrelevant testimony at the fairness hearing, and a three-month-late objection to the Settlement Agreement. Neither of these actions required new research, shed new light on the issues in this lawsuit, or added anything to the work of Dr. Weiss, who no longer seeks a fee. In short, they were worthless.

CONCLUSION

Mr. Dubbin's motion for attorney's fees is rejected. While he may have expended considerable time in connection with this case, that time was neither necessary nor helpful to the plaintiffs' class. More to the point, it does not deserve compensation from the settlement fund.

SO ORDERED.

Appendix L

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

Docket No. 04–1898–CV(L), 04–1899–CV(CON)

Argued: May 16, 2005 Decided: Sept. 9, 2005

IN RE HOLOCAUST VICTIM ASSETS LITIGATION

Samuel J. Dubbin,

Plaintiff–Appellant,

Pink Triangle Coalition, Karl Lange and Pierre Seel,

Interested Parties–Cross–Appellants,

—v.—

Union Bank of Switzerland, Swiss Bank Corp., also known as Swiss National Bank, Banking Institutions #1–100, John Does #1–100, Certain Swiss Bank Accounts described as follows, Swiss Bankers Assoc., Swiss Bankers Association and Bank of International Settlements,

Defendants–Appellees,

Plaintiffs' Executive Committee Settlement Class,

Interested–Party–Appellee,

Judah Gribetz,

Special Master,

Jacob Friedman, Estelle Sapir and Miriam Stern, on behalf of themselves and all other persons similarly situated,

Plaintiffs,

World Jewish Restitution Organization, South Florida Holocaust Coalition and Thomas Weiss,

Intervenor–Plaintiffs,

Washington State Insurance Commissioner, Gregory Tsvilichovsky, Matvey Yentus, Sofiya Bloshteyn, Olga Tsvilikhovskya, Larisa Ryabaya, Rosa Yentus, Pavel Aronov, Lubov Starodinskaya and Eliazar Bloshteyn,

Interested–Parties,

Polish American Defense Committee, Inc., a non-profit California Corporation, Irving Wolf, Disability Rights Advocates and Director of International Affairs and Representative to the United Nations of Agudath Israel World Organization,

Movants,

G.K., a Holocaust Survivor and member of the New American Jewish Club of Miami, L.K., a Holocaust Survivor and member of the New American Jewish Club of Miami, F.K., a Holocaust Survivor and member of the New American Jewish Club of Miami, Holocaust Survivors Foundation USA, Inc. (HSF), David Schaecter, individually and as President of the Holocaust Survivors Foundation–USA, Inc., Leo Rechter, individually and as President of the National Association of Jewish Holocaust Survivors (NAHOS), National Association of Jewish Holocaust Survivors (NAHOS), David Mermelstein,

individually and as President of the New American Jewish Club of Miami and President of the South Florida Holocaust Survivors Coalition, New American Jewish Club of Miami, South Florida Holocaust Survivors Coalition, Alex Moskovic, individually and as President of the Child Survivors/Hidden Children of the Holocaust, Inc., Child Survivors/Hidden Children of the Holocaust, Esther Widman, individually as member of the National Association of Jewish Holocaust Survivors (NAHOS), Fred Taucher, individually and as President of the Survivors of the Holocaust Recovery Project (SHARP), Survivors of the Holocaust Recovery Project (SHARP), Nesse Go-din, individually and as President of the Jewish Holocaust Survivors and Friends of Greater Washington, Jewish Holocaust Survivors and Friends of Greater Washington, Henry Schuster, individually and as President of the Holocaust Survivors Group of Southern Nevada, Holocaust Survivors Group of Southern Nevada, Herbert Karliner, individually and as a member of the Holocaust Survivors Foundation–USA, Inc. and the South Florida Holocaust Survivors Coalition, Lea Weems, individually and as President of the Houston Council of Jewish Holocaust Survivors, Houston Council of Jewish Holocaust Survivors, Sam Gasson, individually and as President of the Habonim Cultural Club, Survivors of the Holocaust, Habonim Cultural Club, Survivors of the Holocaust, Holocaust Survivors of South Florida, Dena Axelrod, individually and as a member of the Child Survivors of the Holocaust, South Florida Group and the South Florida Holocaust Survivors Coalition, Saul Birnbaum, individually and as President of the Holocaust Survivors Club of Boca Raton (Century Village), Holocaust Survivors Club of Boca Raton (Century Village), Miriam Rubin, Individual Holocaust Survivor, Doris Fedrid,

Individual Holocaust Survivor, Helga Gross, Individual Holocaust Survivor, National Federation of the Blind, USA, German Council of Centers for Self–Determined Lives, Finist, Russia, Equal Ability Limited, United Kingdom, Through the Looking Glass, USA, Disabled Persons International, Canada, World Institute on Disability, USA, Center for Independent Living, Bulgaria, Disability Rights Education and Defense Fund, US, Center for Independent Living, Berkeley, USA, California Foundation for Independent Living Center, Independent Living Resource Center, San Francisco, Computer Technologies Program, USA, Ragged Edge/Avocado Press, USA, Legal Advocacy for the Defense of People with Disabilities, National Confederation of Disabled Persons, Greece and De juRe Alapitvany, Hungary,

Appellants.

Edward Labaton, Goodkind Labaton Rudoff & Sucharow, LLP, New York, NY (Arthur J. England, Jr., Charles M. Auslander, and Brenda K. Supple, Greenberg Traurig, P.A., Miami, FL; Samuel J. Dubbin, Dubbin & Kravetz, LLP, Coral Gables, FL; Stephen Burbank, Philadelphia, PA, of counsel) *for Appellants.*

Burt Neuborne, New York, NY, and Robert A. Swift, Kohn Swift & Graf, PC, Philadelphia, PA (Melvyn I. Weiss, Deborah M. Sturman, Milberg Weiss Bershad & Schulman LLP, New York, NY; Morris A. Ratner, Caryn Becker, Lieff Cabraser Heimann & Bernstein, LLP, New York, NY) *for Appellees.*

Before:

MESKILL, NEWMAN, and CABRANES,
Circuit Judges.

JOSÉ A. CABRANES, *Circuit Judge.*

Samuel J. Dubbin appeals from a March 31, 2004 memorandum and order of the United States District Court for the Eastern District of New York (Edward R. Korman, *Chief Judge*) denying his request for attorney's fees in connection with the settlement of the litigation styled as the Holocaust Victim Assets Litigation. *See In re Holocaust Victim Assets Litig.*, 311 F.Supp.2d 363 (E.D.N.Y.2004). Dubbin's principal claim to attorney's fees rests on his purported contributions to an amendment to the settlement agreement that modified releases granted to Swiss insurance companies. In a comprehensive published opinion, the District Court analyzed, and ultimately rejected, Dubbin's fee request on the ground that his contributions were "late, tangential, and ultimately irrelevant." *Id.* at 378. We affirm.

BACKGROUND

This appeal was consolidated with an appeal from the District Court's settlement allocation and distribution orders brought by, *inter alia*, Holocaust Survivors Foundation–U.S.A., Inc. ("HSF"), an entity represented by Dubbin. We adjudicate the HSF's appeal in a separate opinion, *In re Holocaust Victim Assets Litig.*, 424 F.3d 132 (2d Cir.2005), which summarizes the claims underlying the Holocaust Victim Assets Litigation and its procedural history. We assume familiarity with that

summary and highlight here only those background events directly relevant to this appeal.

The settlement agreement signed by the parties on January 26, 1999 would have had the effect of releasing Swiss insurance companies (with three specific exceptions) from liability for certain Holocaust-related claims. *In re Holocaust Victim Assets Litig.*, 311 F.Supp.2d at 365. On May 10, 1999, the District Court set an October 22, 1999 deadline for comments on the settlement agreement. *In re Holocaust Victim Assets Litig.*, No. 96–4849, slip op. at 4 (E.D.N.Y. May 10, 1999) (scheduling order). Only one of the 200 timely submissions specifically addressed the insurance releases—an October 20, 1999 objection by Washington State Insurance Commissioner Deborah Senn. Commissioner Senn principally argued that

> [t]he proposed settlement is unfair to insurance policyholders and beneficiaries. It releases all claims against all Swiss insurers and reinsurers [with three exceptions]. There has been no public review of their records to determine their unpaid Holocaust policies or their value. These companies may be released from many millions of dollars of wrongfully unpaid claims in exchange for relatively *de minimis* payments to policyholders or their heirs. Class members are required to decide whether to opt out of the class without even being told whether they or a family member were covered by policies or the face amount of such policies, although this information may be in the possession of the settling companies. The proposed settlement undermines the Inter-national Commission on Holocaust Era Insurance Claims ["ICHEIC"] whose protocols provide for identification, valuation and payment of policies.

Commissioner Senn's concerns were echoed in a November 18, 1999 letter by Lawrence S. Eagleburger, the Chairman of the ICHEIC and former U.S. Secretary of State.

Only on November 24, 1999—more than a month after the deadline for objections, and well after the District Court had received the submissions of Commissioner Senn and Secretary Eagleburger—did Thomas Weiss, who was then represented by Dubbin, send a letter to the Court regarding the insurance company releases. This letter reads, in its entirety:

> Dear Judge Korman,
>
> It was brought to my attention that the Swiss bank settlement of $1.25 billion releases the Swiss insurance companies [with three exceptions] from any further liability. This is completely unacceptable, as many Swiss insurance companies acted as cloaking agents for Munich [Reinsurance] of Germany during WWII. U.S. military and intelligence/legal documents from 1944–47 state this explicitly and charge Munich [Reinsurance] with criminal activity. Additionally, this surreptitious inclusion of these companies is not known to the general survivor community. Your assistance to remove this inappropriate blanket amnesty for the Swiss insurance industry is vital.
>
> The Bergier[ ] report states that the amount that the Swiss owe regarding stolen WWII gold may exceed six billion dollars. The documents further state that although the Swiss banking industry stopped receiving gold at a point before the end of the war (as a result of Treasury Secretary Henry Morganthau's admonition that there will be a day of reckoning) the Swiss insurance industry continued receiving

> stolen gold up to the last days of the war. Justice demands that the Swiss insurance industry not escape its responsibility.
>
> Sincerely,
>
> [signed]
>
> Thomas Weiss, MD

Dubbin made substantially the same points in an oral statement during a November 29, 1999 fairness hearing before the District Court. In the main, he cautioned the Court against "a blanket release of unnamed and unidentified companies, which we know from evidence in the archives may well have been beneficiaries of looted Jewish assets through the access in Nazi insurance trusts, without being even identified or held to account in any way, shape or form for what their responsibilities are." Dubbin added:

> I know that Commissioner [Senn] in the State of Washington and Chairman [Eagleburger] have brought this question to the Court's attention. But particularly in light of some of the documents we have found, we felt on behalf of the Florida survivor community and Dr. Weiss in particular, we would urge you—and I know [the Lead Settlement Counsel, Professor Burt] Neuborne said if we have any problems with the settlement, please bring them to his attention.
>
> I don't know what benefit accrues to survivors from what may be a big surprise at the end of the road, when we find out some of the companies not even identified today being released could well be

> as culpable as some of the ones who we've been talking about all these years. Thank you very much.

In a December 22, 1999 conference that followed the fairness hearings, the District Court instructed the Lead Settlement Counsel to renegotiate the releases of Swiss insurance companies. *In re Holocaust Victim Assets Litig.*, 311 F.Supp.2d at 370.

On January 31, 2000, approximately six weeks after the Lead Settlement Counsel received this charge from the District Court (and three months after the deadline for comments on the original settlement agreement), Dubbin filed a written objection to the settlement agreement. The objection principally criticized the "broad inclusion of Swiss insurers, and, thereby, claims for unpaid insurance policies under the umbrella of this litigation."

In May 2000, the parties to the class action agreed to amend the settlement agreement in a manner that addressed the District Court's concerns regarding the insurance company releases. *In re Holocaust Victim Assets Litig.*, 311 F.Supp.2d at 373. The amended settlement agreement designated an amount of up to $100 million—including up to $50 million provided by the insurance companies—for the resolution of unpaid insurance claims. *Id.* at 373–74. In a memorandum and order dated July 26, 2000, the District Court approved the amended settlement agreement. *In re Holocaust Victim Assets Litig.*, 105 F.Supp.2d 139, 160 (E.D.N.Y. 2000). Its final order approving the agreement was entered August 9, 2000.

Dubbin subsequently informed the District Court of his intention to appeal, on behalf of Weiss, the approval of the amended settlement agreement. *See In re Holocaust Victim Assets Litig.*, 311 F.Supp.2d at 374–75. The

Court met with Dubbin and Weiss to discuss their concerns, and it subsequently described what transpired:

> After the discussion appeared to be going nowhere, Dr. Weiss asked how much I would pay to prevent them from filing a notice of appeal. Specifically, he wanted me to provide attorneys fees and funds for private research that would assist him in his litigation against [the Italian insurance firm] Generali. This was beyond the pale. I was not going to be blackmailed, particularly with funds that belong to Holocaust survivors.

Id. at 375. Dubbin then filed a notice of appeal on Weiss's behalf, but eventually withdrew it without filing a brief. Other parties, however, appealed from the District Court's order approving the amended settlement agreement. We affirmed. *See In re Holocaust Victim Assets Litig.*, 413 F.3d 183 (2d Cir.2001).

Dubbin then submitted a fee application seeking a total of $5.9 million—$3.6 million for himself and approximately $2.3 million for Weiss. *See In re Holocaust Victim Assets Litig.*, 311 F.Supp.2d at 364 (quoting *In re Holocaust Victim Assets Litig.*, 302 F.Supp.2d 89, 116–17 (E.D.N.Y.2004)). This request was " 'almost equal to the total amount of legal fees awarded to those counsel who were compensated for their role in obtaining the *$1.25 billion* settlement with the Swiss banks.' " *Id.* (emphasis added). Of the total fees requested, $2.9 million ($600,000 for Dubbin and $2.3 million for Weiss) was sought in connection with the amended releases of Swiss insurance companies. *See id.* After the District Court first addressed the merits of these requests on March 9, 2004, *see In re Holocaust Victim Assets Litig.*, 302 F.Supp.2d at 118, the amount of these requests "substantially diminished." *In re Holocaust Vic-*

tim Assets Litig., 311 F.Supp.2d at 364. Indeed, Weiss withdrew his request entirely. *Id.* Dubbin decreased his request multiple times, eventually seeking fees of $309,051 and expenses of $41,318. *Id.*

In a memorandum and order dated March 31, 2004, the District Court denied Dubbin's fee request in its entirety. *Id.* In the course of doing so, the Court provided a detailed factual account of the chain of events that precipitated its request for a renegotiation of insurance releases. It underscored, first, the significance of the objections raised by Commissioner Senn and Secretary Eagleburger. *Id.* Although "the thrust of the Senn and Eagleburger objections was on maintaining the ongoing viability of ICHEIC—something not ultimately relevant to the decision to amend the Settlement Agreement"—these objections "caused [the Court] to focus on the validity of the insurance releases." *Id.* Importantly, the District Court found that its attention had been drawn to the insurance releases *before* it received Weiss's November 24, 1999 letter. *Id.*

Once Weiss's letter arrived—over a month after the deadline for submitting formal objections—the District Court summarized its significance as follows:

> The letter itself stated little more than a general notion that the insurance companies had done wrong and that releasing them was therefore inappropriate. More to the point, the letter did not address the actual defect in the insurance releases, focusing instead on the extent to which Swiss insurance companies engaged in cloaking assets. Whether a company cloaked—that is, hid—assets on behalf of the Nazis is wholly irrelevant to a claimant who is seeking to recover from an insurance company for a policy once held by a victim of Nazi persecution.

Id. at 368.

The District Court further found that Dubbin's statement at the November 29, 1999 fairness hearing merely "elaborate[d] on the letter his client had sent [the Court] a week earlier . . . and added nothing to the legal arguments that Commissioner Senn had already advanced in a timely fashion." *Id.* at 369.

Following the fairness hearing, the District Court took the following actions:

> [C]oncerns that had been brewing led [the Court] to call a conference with the parties. After the parties had a time to prepare, [the Court] held a conference on December 22, 1999, some three weeks after the fairness hearing. One of the purposes of the meeting, as recorded by Deputy Special Master Shari Reig, was to "discuss[ ] the two key issues that Judge Korman has made it clear he wants to resolve prior to ruling on the fairness of the settlement—art and insurance." In the end, [the Court] insisted that the insurance releases be renegotiated not because Swiss insurance companies had cloaked assets or engaged in other wrongdoing unrelated to avoiding payment of insurance policies issued to victims of Nazi persecution. Rather, [the Court] was concerned with the straightforward legal point that, as originally drafted, the insurance releases were unenforceable because Swiss insurance companies were released from claims by beneficiaries or heirs who were not receiving any direct and distinct benefit for these releases. In addition, these potential claimants were not adequately informed that their claims were being released. . . .
>
> . . .
>
> By the time of the December 22, 1999 meeting, [the Court] had become convinced that the insur-

> ance releases were unenforceable as drafted. Indeed, when [the Court] eventually approved the amended settlement, [the Court] wrote: "[I]f the carriers do not reaffirm [the amended insurance releases], I will issue a supplemental decision on the enforceability of the original insurance releases." [The Court] was prepared to hold them unenforceable as violating the consideration requirement of *[National Super Spuds, Inc. v. New York Mercantile Exchange*, 660 F.2d 9 (2d Cir.1981)]. This legal defect is why [the Court] asked Professor Neuborne to reenter negotiations. It had nothing to do with the five minutes of testimony Mr. Dubbin had presented at the fairness hearing. If any submission is to be credited for opening this reconsideration, it is that of Commissioner Senn, who in a *timely fashion* pointed out that there was a problem with the "*de mini mis*" return class members were going to receive from the insurance releases and the general insufficiency of the notice.

Id. at 370–71 (citations omitted) (emphasis in original).

The Court then summarized Dubbin's contributions to the settlement agreement as follows:

> First, he submitted nothing prior to the deadline for written objections to the Settlement Agreement and nothing prior to the fairness hearing. Second, Mr. Dubbin spoke briefly at the fairness hearing repeating the sentiments and research of his client, expressing his approval of objections that had been filed in a timely matter by other individuals, and adding his concern that many Swiss insurance companies engaged in cloaking assets. Third, Mr. Dubbin filed a largely irrelevant written objection based on research by his client three months late and six

> weeks after [the Court] had decided that the insurance releases were unenforceable. Fourth, Mr. Dubbin stood by as his client attempted to extort a significant cash award from a fund belonging to Holocaust survivors in exchange for not filing a notice of appeal from [the Court's] judgment approving the fairness of the settlement. And fifth, Mr. Dubbin filed that notice of appeal. For this, he initially sought $600,000, and now seeks $309,051 in fees plus $41,318 in disbursements.

Id. at 375. The District Court found these contributions "worthless," and denied Dubbin's fee request. *Id.* at 382.

Dubbin now appeals from this decision.

DISCUSSION

Under the "common fund doctrine," a party that secured "a fund for the benefit of others, in addition to himself, may recover his costs, including his attorney's fees, from the fund itself or directly from the other parties enjoying the benefit." *Savoie v. Merchants Bank*, 84 F.3d 52, 56 (2d Cir.1996). The actions of the party seeking to recover costs must, however, be "a substantial cause of the benefit obtained." *Id.* at 57. Dubbin agrees, as he must, that "a material benefit to the class is the *sine qua non* for an attorney's entitlement to an award of fees from the common fund." Appellant's Br. at 30. The District Court concluded that Dubbin's contributions failed to offer any material benefit to the class. We agree.

We review the District Court's denial of attorney's fees for an abuse of discretion. *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 47–48 (2d Cir.2000). "A district court 'abuses' or 'exceeds' the discretion accorded to it

when (1) its decision rests on an error of law (such as application of the wrong legal principle) or a clearly erroneous factual finding, or (2) its decision—though not necessarily the product of a legal error or a clearly erroneous factual finding—cannot be located within the range of permissible decisions." *Zervos v. Verizon N.Y., Inc.*, 252 F.3d 163, 169 (2d Cir.2001) (footnotes omitted).

It merits underscoring that " 'abuse of discretion'—already one of the most deferential standards of review— takes on special significance when reviewing fee decisions." *Goldberger*, 209 F.3d at 47. "[T]he district court, which is intimately familiar with the nuances of the case, is in a far better position to make [such] decisions than is an appellate court, which must work from a cold record." *In re Bolar Pharm. Co. Sec. Litig.*, 966 F.2d 731, 732 (2d Cir.1992).

Upon careful review of the record ~~of~~ this case, we conclude that the District Court acted well within its discretion in finding (1) that the renegotiation of the Swiss insurance company releases was initiated well before Dubbin submitted his formal objection on January 31, 2000; (2) that the decision to renegotiate these releases was triggered by the Senn and Eagleburger objections, rather than by Weiss's November 24, 1999 letter or by Dubbin's November 29, 1999 statement at the fairness hearing; and (3) that, in any event, "the amendment to the Settlement Agreement as it related to insurance companies did not embody alterations urged by Mr. Dubbin." *In re Holocaust Victim Assets Litig.*, 311 F.Supp.2d at 380 (alterations omitted). We thus find no support for Dubbin's contention that his participation substantially contributed to the insurance-related amendments to the settlement agreement.

In his appellate brief, Dubbin retreats to the position that even counsel who have not increased "the monetary value of a settlement" may nonetheless receive attorney's fees if "they sharpen the focus of settlement issues and provide important insights shaping the settlement." Appellant's Br. at 31. Assuming *arguendo* that this position is accurate as a matter of law, nothing in the record of this case or in the findings of the District Court indicates that Dubbin's contribution has crossed even this reduced threshold.

Dubbin further claims that he is entitled to attorney's fees on the basis of his January 31, 2000 written objection to the original settlement agreement despite the fact that the District Court had requested amendments to that agreement six weeks *before* Dubbin's submission was filed. Relying on two decisions—*White v. Auerbach*, 500 F.2d 822 (2d Cir.1974), and *Green v. Transitron Electronic Corp.*, 326 F.2d 492 (1st Cir.1964)—Dubbin asserts that he is entitled to compensation because the District Court's intention to pursue the amendment was not "revealed" until after he filed his January 2000 objection. Appellant's Br. at 39.

The cases on which Dubbin relies are inapplicable here. In *White*, we emphasized that "[o]rdinarily the trial judge has broad discretion in deciding whether, and in what amount, attorneys' fees should be awarded, since he is in the best position to determine whether the participation of objectors assisted the court and enhanced the recovery." 500 F.2d at 828. In that case, however, we faced "an unusual situation in that the district judge who passed on the applications for attorneys' fees did not preside over the proceedings which formed the basis for the applications," because the judge who presided over the latter proceedings had died. *Id.* at 826. Here, by contrast, Chief Judge Korman presided over both the set-

tlement and the fee application, and his assessments of Dubbin's contributions should therefore be accorded deference.

In *Green*, the First Circuit held that it is "unfair to counsel when, seeking to protect his client's interest and guided by facts apparent on the record, he spends time and effort to prepare and advance an argument which is ultimately adopted by the court, but then receives no credit therefor because the court was thinking along that line all the while." 326 F.2d at 499. There are, however, at least three salient differences between Dubbin's fee application and that of the attorneys in *Green:* (1) unlike Dubbin, those attorneys were "not [ ] volunteer[s] but came in at the invitation of the court," *id.;* (2) Dubbin's legal argument was not, in fact, "adopted by the court"; and (3) Dubbin could hardly have had a reasonable expectations that the labor he invested into his substantive filing would be compensated once he had missed the Court's deadline by three months.

CONCLUSION

We have carefully considered all of Dubbin's arguments and we find each of them to be without merit. Accordingly, the District Court's memorandum and order of March 31, 2004 is hereby affirmed.

Appendix M

Judah Gribetz
Special Master
Holocaust Victim Assets Litigation
Case No. CV 96-4849
399 Park Avenue
New York, NY 10022
Phone: (212) 705-7221
Fax: (212) 750-9022

April 24, 2006

Hon. Edward R. Korman
Chief Judge
United States District Courthouse
225 Cadman Plaza East
Brooklyn, N.Y. 11201

Dear Judge Korman:

At your request, we provide below updated information concerning the distributions and/or allocations that have been made to class members, thus far, from the $1.25 billion Settlement Fund. This information also is summarized in the accompanying chart (Swiss Banks Settlement Fund Distribution Statistics as of April 20, 2006) which provides data concerning total amounts paid, and number of claimants paid, by class.

As of April 20, 2006, a total of $875,502,616 has been distributed or allocated to all class members. Specifically, the following amounts have been distributed or allocated:

- **Deposited Assets Class:** A total of $374,545,141 has been approved to date for distribution or allocation to members of the Deposited Assets Class. This sum is comprised of the following amounts:

1. $291,360,649 has been approved for payment under the CRT-II process. CRT-II, which operates in Zurich under the Court's authority, reviews Deposited Assets claims and recommends that the Court issue awards where it determines that one or more Holocaust-era Swiss bank accounts belongs to claimant(s) based upon the CRT's analysis of the bank account documentation made available by Swiss banking authorities. Thus far, 3,674 Holocaust victims or heirs have been approved to receive awards under the CRT-II process for the return of Swiss bank accounts. A total of 2,011 awards have been made and 3,277 accounts have been awarded (a number higher than the total number awards, because many Account Owners held more than one account). Excluding one award in the amount of approximately $22 million approved in April 2005, the average award to date has been $134,080. The average account value to date has been $82,265 (excluding the foregoing $22 million award).

2. $18,184,492 was approved under the CRT-I process, paid for by the Settlement Fund in accordance with the terms of the Settlement Agreement. CRT-I adjudicated claims to Holocaust-era Swiss bank accounts prior to the creation of the Settlement Fund. Of the foregoing amount, $12,171,691 was paid pursuant to an agreement between Class Action plaintiffs and defendants, an amount which was paid by the defendant Swiss banks and reimbursed by the Escrow Fund or Settlement Fund. The balance of $6,012,802 represents direct payments to

CRT-I claimants paid by the Escrow Fund or Settlement Fund.

3. $10,525,000 has been approved by the Court for payment to 2,105 claimants who have satisfied certain criteria and thereby demonstrated that they have plausible undocumented claims to Holocaust-era Swiss bank accounts. The claims have been reviewed by the New York-based Swiss Deposited Assets Program of the CRT (CRT-NY). *See* Orders of February 17, 2006 and March 29, 2006.

4. Approximately $54,475,000 is expected to be approved by the Court for payment to approximately 11,000 additional claimants based upon their plausible undocumented claims to Holocaust-era Swiss bank accounts. The approximately 11,000 additional claims already have been reviewed by CRT-NY and have been determined to have satisfied the relevant criteria. The additional awards will be submitted to the Court for approval upon completion of certain administrative tasks, by no later than *August 2006. See* Order of February 17, 2006.

With respect to the geographic distribution of Jewish recipients of Deposited Assets Class awards under the CRT-II process as well as to those already approved in connection with the CRT-NY analysis of plausible undocumented claims, as of April 20, 2006, 10.1% of payments have been approved for class members in Israel; 40.9% of payments have been approved for those in the U.S., 0.1% of payments have been approved for those in the former

Soviet Union (FSU); and 49% o of payments have been approved for those in other countries.

- **Looted Assets Class:** $205 million has been distributed or allocated to humanitarian assistance programs serving needy Holocaust survivors. The program has been in operation since mid-2001 and is scheduled to continue through 2011 (tracking the approximately ten-year life expectancy estimated in 2000 to remain for the average Nazi victim). Of this amount, $184,500,000 has been distributed or allocated to programs serving needy Jewish Nazi victims, and another $20,500,000 has been distributed to programs serving needy Roma, Jehovah's Witness, homosexual and disabled Nazi victims; the latter program for the benefit of non-Jewish class members is now complete. Of the amount distributed or allocated to programs serving Jewish victims, $138,375,000 has been allocated over the ten-year program to needy Nazi victims in the former Soviet Union (FSU). Another $23,062,500 has been distributed or allocated to programs serving needy Jewish Nazi victims in Israel, while $23,062,500 has been distributed or allocated to programs serving needy Jewish Nazi victims in other parts of the world, including Central and Western Europe, the United States and elsewhere.

  As to payments, as of year-end 2006, $12,389,518 will have been approved for payment to needy Jewish Nazi victims in Israel (12.5% of Looted Assets Class payments made to Jewish class members thus far); $4,003,666 will have been approved for payment to needy Jewish Nazi victims in the United States (4%); $74,228,365 will have been approved for payment to needy Jewish Nazi victims in the

FSU (75%); and $8,349,602 will have been approved for payment to needy Jewish Nazi victims in other parts of the world (8.4%).

- **Slave Labor Class I:** $273,304,700 has been approved for payment to 188,486 former slave laborers for companies owned or operated by German entities. Each former slave laborer receives $1,450. Of the $273,304,700, $241,525,050 has been approved for payment to 166,569 Jewish Nazi victims and certain heirs, and $31,779,650 has been approved for payment to 21,917 Roma, Jehovah's Witness, homosexual or disabled Nazi victims and certain heirs.

  With respect to the geographic distribution of Jewish recipients of Slave Labor Class I payments, as of April 20, 2006, 47.6% of payments have been made to those in Israel; 22.8% of payments have been made to those in the U.S., 2.1% of payments have been made to those in the FSU; and 27.5% of payments have been made to those in other countries.

- **Slave Labor Class II:** $688,750 has been approved for payment to 475 former slave laborers for companies owned or operated by Swiss entities. As with Slave Labor Class I, each former slave laborer receives $1,450. Slave Labor Class II is not limited to the five "victim or target" groups specified in the Settlement Fund but, rather, is open to all Nazi victims. The vast majority of Slave Labor Class II awards have been approved for non-Jewish victims.

Refugee Class: $11,389,025 has been approved for payment to 4,071 survivors and certain heirs. Of this amount, $10,650,250 has been approved for

payment to 3,858 Jewish survivors and certain heirs based upon the denial of entry or expulsion from Switzerland (each of whom receives $3,625), or admission into Switzerland but mistreatment there (each of whom receives $725). Another $738,775 has been approved for payment to 213 Roma, Jehovah's Witness, homosexual or disabled Nazi victims who were denied entry or expelled (again, each of whom receives $3,625), or admitted but mistreated (each of whom receives $725).

With respect to the geographic distribution of Jewish recipients of Refugee Class payments, 23.4% of payments have been made to those in Israel; *41.2%* of payments have been made to those in the U.S., 0.1% of payments have been made to those in the former Soviet Union (FSU); and 35.3% of payments have been made to those in other countries.

To summarize all *distributions and allocations* from the Settlement Fund to Jewish class members to date: (1) class members in Israel have been approved to receive 23% of all distributions or allocations; further, some additional percentage of forthcoming plausible undocumented awards under the CRT-NY program also will be made to individuals residing in Israel; (2) class members in the United States have been approved to receive 25.8% of all distributions and allocations, and an additional number shortly will receive payments based upon plausible undocumented claims to Deposited Assets; (3) class members in the FSU have received 19.4% of all payments or allocations, the bulk of which consists of the Looted Assets Class allocations that are to be distributed over a ten-year period in total; and (4) class members in other parts of the world have received 31.7% of all distributions and allocations, and an additional number

shortly will receive payments based upon plausible undocumented claims to Deposited Assets.

As for *distributions* from the Settlement Fund to Jewish class members as of December 31, 2006 (i.e., excluding future Looted Assets Class allocations committed through 2011): (1) class members in Israel will have received 24.5% of all payments; (2) those in the United States will have received 28.6%; (3) those in the FSU will have received 12.2%; and (4) those in other parts of the world will have received 34.7%.

Finally, in addition to the programs described above, as the Court is aware, $10 million of the $1.25 billion Settlement Fund (less than 1%) was reserved under the Distribution Plan for the Victim List Project. To date, the Court has authorized payments of $1.76 million to Yad Vashem - The Holocaust Martyrs' and Heroes' Remembrance Authority of Israel, and another approximately $1.14 million to the United States Holocaust Memorial Museum.

Respectfully submitted,

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Judah Gribetz, Special Master

SHARI C. REIG

Shari C. Reig, Deputy Special Master

cc: Prof. Burt Neuborne

Holocaust Victim Assets Litigation
Case No. CV 96-4849

Swiss Banks Settlement Fund Distribution
Statistics as of April 20, 2006

Totals as of April 20, 2006:

	Funds distributed or allocated	Approved Claimants
Deposited Assets Class	$374,545,141	≅ 16,674[1]
Looted Assets Class	$205,000,000	≅ 180,738[2]
Slave Labor Class I	$273,304,700	188,486
Slave Labor Class II	$688,750	475
Refugee Class	$11,389,025	4,071
Incentive Awards[3]	$575,000	7
Victim List Project[4]	$10,000,000	n/a
GRAND TOTAL:	**$875,502,616**	**≅ 390,451 claimants**

1. Deposited Assets **$374,545,141**

CRT-II

Documented Awards

Total Amount:	**≅ $291,360,649**	(through CRT Batch 96)
Total Awards:	2,011	
Total Accounts Awarded:	3,277	
Average Award:	$134,080[5]	
Average Account:	$82,265	

Plausible Undocumented Awards[6]

Approximate Allocation:	**$65,000,000**
Estimated Total Awards:	13,000
Award Amount:	$5,000

CRT-I

Total Amount: $18,184,492[7]

2. Looted Assets

$205,000,000 allocated to programs serving needy survivors

(JDC, Claims Conference and IOM):

Jewish:	$184,500,000
Non-Jewish (10%):	$20,500,000
Of Jewish Allocation:	
Former Soviet Union (75%):	$138,375,000
Rest of World (25%):	$46,125,000
Israel (50%)	$23,062,500
Rest (50%)	$23,062,500

3. Slave Labor I ($1,450 each)

$273,304,700 awarded for 188,486 Nazi victim claims approved

Claims Conference:

$241,525,050	for 166,569 Jewish Nazi victim claims approved	(through Tranche 24)

IOM:

$31,779,650	for 21,917 Roma, Jehovah's Witness, Homosexual and Disabled Nazi victim claims approved[8]	(through Group XVI)

4. <u>Slave Labor II</u>
<u>($1,450 each)</u>

$688,750	**awarded for 475 Nazi victim claims approved**[9]	(through Group XVI)

(IOM only)

5. <u>Refugees ($3,625</u>
<u>or $725 each)</u>

$11,389,025	**awarded for 4,071 Nazi victim claims approved**[10]	

Claims Conference:

$10,650,250	for 3,858 Jewish Nazi victim claims approved	(through Group 33)

IOM:

$738,775	for 213 Roma, Jehovah's Witness, Homosexual and Disabled Nazi victim claims approved	(through Group XVI)

---

[9] This figure is comprised of: (1) 3,674 claimants approved for awards based upon documentary evidence obtained from Swiss banks and other sources, under the process administered in Zurich by the Claims Resolution Tribunal (CRT-II) under the authority of the United States District Court for the Eastern District of New York; (2) 2,105 claimants thus far approved to receive Deposited Assets Class awards based upon their plausible undocumented claims, under the CRT-II process administered in New York under the Court's authority; and (3) an estimated 10,895 additional claimants expected to receive awards based upon their plausible undocumented claims, which are expected to be submitted for review and approval by no later than August, 2006. See Order of February 17, 2006. There are also additional claimants who have received awards under the CRT-I claims process.

CRT-II also has recommended that the Court reject an additional 16,455 claims, consisting of (1) 837 denials, (2) 1,442 determinations of inadmissibility, and (3) 14,177 "No Match" Decisions. These terms are defined as follows:

(1) Denials are defined as claims that the CRT determines to be ineligible for awards. There are a variety of bases for such determinations: (a) the claimant's relative and the account owner are not the same individual, based upon information in the bank records and/or other sources ("identity" denials); (b) the available evidence indicates that the account was closed properly and the account owner received the proceeds ("disposition denials"); (c) the claimant is not entitled to the claimed account, whether due to the absence of a family relationship to the account owner or for other reasons ("entitlement" denials); and (d) the names) of the relative(s) claimed to have owned Holocaust-era Swiss bank accounts, and the names of account owners made available to the CRT by the Swiss banks or located via other sources, do not match ("no match" denials).

(2) Inadmissibility decisions are defined as claims that the CRT determines to be ineligible to participate in the Deposited Assets Class process. Under the terms of the Settlement Agreement, only the accounts of "Victims or Targets of Nazi Persecution" can be paid from the Settlement Fund. The Settlement Agreement defines "Victims or Targets of Nazi Persecution" as those who were, or were perceived to be, Jewish, Romani, Jehovah's Witness, disabled, or homosexual. Neither the CRT nor the Court has the authority, under the terms of the Settlement Agreement, to address Deposited Assets Class claims asserted on behalf of account owners who were not "victims or targets" as defined above.

(3) "No Match" Decisions are issued when the CRT determines that there are no accounts in the Account History Database (AHD) matching to names of account owners that have been provided to the CRT by the claimant. The AHD consists of 36,131 accounts identified during the investigation of Swiss banks by the Independent Committee of Eminent Persons (ICEP or the Volcker Committee) as probably or possibly belonging to victims of Nazi persecution, augmented to 37,373 by account information obtained by the CRT from other sources. The CRT uses advanced name matching systems and computer programs in conducting its matching analysis. Further, the CRT matches not only the names of persons specifically claimed to have owned a Swiss bank account, but the names of other family members identified by the claimant.

[2] Approximately 181,000 surviving Nazi victim have been compensated from the Settlement Fund through programs serving the neediest members of the Looted Assets Class. The figure is derived from the following three sources:

(1) Approximately 13,170 Jewish victims to date have been served by programs administered on the Court's behalf by the Conference on Jewish Material Claims Against Germany, Inc. (Claims Conference). See February 15, 2005 Letter of Greg Schneider, Claims Conference Chief Operating Officer, to Special Master Judah Gribetz, as well as attached statistical charts concerning the number of victims served from Jan. 1 to Dec. 31, 2004.

(2) Approximately 93,728 Jewish victims to date have been served by programs administered on the Court's behalf by the American Jewish Joint Distribution Committee (JDC). See "JDC Report on 2004 Welfare Programs for Jewish Nazi Victims in the Former Soviet Union," August 4, 2005 (JDC 2004 Report). Statistics concerning the number of victims served are set forth in the chart annexed to the JDC 2004 Report entitled "*Services Provided in the FSU in 2004 to Jewish Nazi Victims from the Swiss Bank Settlement Funds,*" "*# of* Nazi Victims Receiving Food Packages from the Settlement Fund." As the chart indicates, Court-funded programs reach a portion *of* the Nazi victims served by JDC programs in the FSU. All victims in the FSU served by the Court's programs receive food packages (93,728). Smaller numbers of victims may also receive other services such as medical assistance and emergency grants. (See Chart.)

(3) 73,840 non-Jewish victims (Roma, Jehovah's Witness, disabled and homosexual) were served by programs administered on the Court's behalf by the International Organization for Migration (IOM). See "Final Report on Assistance to Needy, Elderly Survivors of Nazi Persecution Humanitarian and Social Programmes", IOM-HSP 2006.

[3] $575,000 in payments were made to seven class members whom the Court determined provided "efforts [which] materially aided the plaintiff class." See, e.g., Memorandum & Order, December 4, 2002.

[4] The Court-approved Distribution Plan allocates $10 million to the Victim List Program (less than 1% of the $1.25 billion Settlement Fund). The intent of the Program is to collect and make widely available the names of all victims or targets of Nazi persecution, those who perished as well as those who survived. To date, $1.76 million has been allocated to the Yad Vashem Holocaust Martyrs' and Heroes' Remembrance Authority in Israel, and approximately $1.14 million to the United States Holocaust Memorial Museum.

[5] Due to the size of the Batch 75 award ($21,860,325.09), which relates to one account only, it is excluded from the calculation of the average award as well as the average account value.

[6] On February 17, 2006, Chief Judge Edward Korman of the United States District Court of the Eastern District of New York approved the first 105 plausible undocumented Deposited Assets Class claims for payment, and on March 29, 2006, he approved an additional 2000 such awards. Each such plausible undocumented award is the amount of U.S. $5,000.00. The total amount expected to be distributed to members of the Deposited Assets Class with plausible undocumented claims is approximately $65 million, based upon the information provided to the Court by CRT-NY that approximately 13,000 claims are eligible for payment. As noted previously, it is expected that by the end of August, 2006, CRT-NY will have submitted, for review and approval, the remainder of the eligible claims.

[7] In reconciling payments of CRT awards by the Escrow and Settlement Funds through 2005, the Settlement Fund's accountants advised that an aggregate of $18,184,492 in CRT-I awards had been paid. Of this amount, $12,171,691 of CRT-I awards were paid pursuant to an agreement between Class Action plaintiffs and defendants. This sum was paid by the banks and reimbursed by the Escrow Fund or the Settlement Fund. The balance of $6,012,802 represents direct payments to CRT-I claimants paid by the Escrow Fund or the Settlement Fund.

[8] This includes four IOM claims approved upon appeal. See Order dated February 2, 2006. In addition, the IOM has recommended that the Court reject 14,497 Slave Labor Class I claims because the claimants did not plausibly demonstrate that they satisfied the relevant criteria as set forth in the Distribution Plan and subsequent implementation orders.

[9] The IOM also has recommended that the Court reject 14,987 Slave Labor Class II claims because the claimants did not plausibly demonstrate that they satisfied the relevant criteria as set forth in the Distribution Plan and subsequent implementation orders.

[10] In addition to the claims approved for payment cited herein, another 2,123 Refugee Class claims have been recommended for rejection by the Claims Conference (1,354) and IOM (769), respectively, because the claimants did not plausibly demonstrate that they satisfied the relevant criteria as set forth in the Distribution Plan and subsequent implementation orders.

(5)

No. 05-1275

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IN THE

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HOLOCAUST SURVIVORS FOUNDATION USA, INC., ET AL.,

Petitioners,

—v.—

UNION BANK OF SWITZERLAND, ET AL.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' SUPPLEMENTAL BRIEF IN OPPOSITION

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IN THE
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No. 05-1275

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Petitioners

v.

UNION BANK OF SWITZERLAND, ET AL.,

Respondents

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENTS' SUPPLEMENTAL BRIEF IN OPPOSITION

Pursuant to Rule 15.8, Respondents respectfully submit this Supplemental Brief in Opposition in order to bring to the Court's attention a serious anomaly in the Reply Brief in Support of the Petition dated May 31, 2006.

I.

PETITIONERS HAVE CONSISTENTLY SUPPORTED THE USE OF THE CY PRES DOCTRINE TO PROVIDE ASSISTANCE TO NEEDY HOLOCAUST SURVIVORS

Petitioners' Reply Brief argues for the first time that even once it became clear that individualized distribution of funds allocated to the Looted Assets class was impracticable, the District Court's exercise of *cy pres* authority to distribute funds for the relief of needy members of the class was unlawful Petitioners' Reply Brief, at 4-6.

As the Second Circuit decision below makes clear, however, while petitioners have challenged the allocation formula pursuant to which the *cy pres* distribution to the needy was carried out, until now, petitioners have supported the District Court's authority to commit Looted Assets class funds for the relief of needy Holocaust survivors. The Second Circuit below accurately summarized HSF's appellate position, as follows:

> ...the HSF asserts that *needy* Holocaust survivors residing in the United States have received a disproportionately small allocation, relative to the *needy* survivors residing in the former Soviet Union.

In re Holocaust Victim Assets Litig, 424 F.3d 132 (2nd Cir 2005)(emphasis added).

Petitioners' brief to the Second Circuit below began with the following statement:

> The members of the class which appellants seek to benefit are *needy* Holocaust survivors, most of whom

> are between the 75 and 85 years of age, for whom ultimate relief would be meaningless without expeditious payment of available funds *for their benefit*. (emphasis added.)

Initial Brief of Appellants "GK" et al, in 04-1898(L), at viii, n.1

Petitioners' September 10, 2003 challenge to the District Court's Looted Assets allocation ruling explicitly urged that the funds be allocated to the needy "*to meet the human services needs of Class members who are currently being underserved*.....Motion for Immediate Interim Distibution of Swiss Settlement Proceeds, September 10, 2003, p.1. (reproduced in the Joint Appendix in the court below as JA 6869).

Petitioners' September 10, 2003 motion stated that funds distributed to survivors residing in the United States would be placed in a trust, and that "*the use of such funds would be guided by an assessment of current need, and the likelihood and timing of funds from other sources*.... *Id* at p. 1, n. 1.

Petitioners' January 30, 2004 submission to the District Court is denominated as a "Plan For Providing Assistance For *Needy* Nazi Victims in the United States.... (reproduced in the Joint Appendix below as JA 7589-7606)(emphasis added).

Finally, on April 29, 2004, in the course of a hearing in the District Court on potential *cy pres* distributions, the following colloquy ensued between the District Court and Mr. Dubbin, counsel of record herein:

THE COURT: Do you propose to give money to every member of the looted assets class?

MR. DUBBIN: We propose...

THE COURT: That can be answered yes or no.

MR. DUBBIN: No, sir, we do not.

THE COURT: No.

MR DUBBIN: But...

THE COURT: And so the people who you're not giving money to, they will have gotten under your theory, no consideration for their release.

MR DUBBIN: Your Honor?

THE COURT: Isn't that true?

MR. DUBBIN: No, people have a responsibility to stand up and express their position with regard to a case which they're a part of. My clients have done that. They are class members. They have objected. *They have objected to the fact that members of the looted assets class who have needs who live in this country have gotten no benefit from [sic]. That's our position. And that's what the appellate court is going to decide.* Transcript of Proceedings, April 29, 2004 at pp. 272-73.

In fact, the extreme position asserted in the Reply Brief appears to mis-state the position of the leadership of

the HSF, which has consistently urged the District Court to allocate Looted Assets funds for the relief of needy survivors, albeit pursuant to a "national residence quota" formula that would benefit needy survivors residing in the United States. See, eg., Letter, dated January 30, 2004, to District Court from Holocaust Survivors Foundation Board of Directors (urging distribution of Looted Assets funds for the benefit of needy survivors residing in the United States) (reproduced in the Joint Appendix below as JA 7450-7454). Indeed, Mr. Dubbin and the petitioners herein sought and obtained precisely such a *cy pres* distribution solely to the needy in connection with the distribution of the $25.5 million Hungarian Gold Train settlement. See *Rosner v. United States of America*, Case No. 01-1849- CIV- SEITZ, S.D. Fla., Final Order and Judgment (September 25, 2005).

In short, the suggestion in Petitioners' May 31, 2006 Reply Brief that petitioners have consistently opposed the use of the *cy pres* doctrine to provide assistance to needy Holocaust survivors is nothing less than an effort to re-write history.

II.

PETITIONERS' BELATED EFFORT TO CHALLENGE THE DISTRICT COURT'S AUTHORITY UNDER THE *CY PRES* DOCTRINE TO DISTRIBUTE LOOTED ASSETS FUNDS FOR THE RELIEF OF NEEDY HOLOCAUST SURVIVORS IS PRECLUDED BY AN EXPLICIT DECISION OF THE SECOND CIRCUIT

Petitioners' belated effort to challenge the District Court's power under the *cy pres* doctrine to allocate Looted Assets funds for the relief of needy class members is

precluded by the Second Circuit's earlier decision in *In re Holocaust Victim Assets Litig*, 413 F.3d 183 (2nd Cir. 2001) (reproduced as Appendix D to the Petition in 05-1275).

In November, 2000, after the District Court had reluctantly determined that it was impracticable to distribute Looted Assets funds on an individualized basis, the District Court directed that Looted Assets funds be distributed for the relief of needy members of the class under the *cy pres* doctrine. *In re Holocaust Victim Assets Litig*, 2000 WL 33241660 (EDNY November 22, 2000) (reproduced as Appendix C to the Petition in 05-1275). A member of the Looted Assets class objected, arguing that the District Court lacked power to distribute settlement funds for the relief of needy class members. After a timely *pro se* appeal was lodged with the Second Circuit, the Circuit appointed counsel for the objector, and the issue was fully briefed and argued before the Circuit. On July 26, 2001, the Second Circuit explicitly found that the challenge to the *cy pres* distribution "lacks legal merit," and affirmed the District Court's allocation of $100 million for the relief of needy Looted Assets class members. 413 F.3d at 186; (App D at D-5).

Petitioners consciously chose not to prosecute their appeal raising similar issues. See Appendix J to the Brief in Opposition in 05-1275 (withdrawal of petitioners' appeal). Nor did petitioners seek certiorari from the Second Circuit's ruling. Accordingly, they are precluded from seeking to raise the issue belatedly almost five years after the rejection of their position by the Second Circuit.

Conclusion

For the above-stated reasons, the petition for certiorari should be denied.

Dated: June 6, 2006
New York, New York

Respectfully submitted

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SUPPLEMENTAL REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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ARGUMENT

1. In their Supplemental BIO, Respondents reiterate their claim that the challenge to the need-based allocation was decided by the Second Circuit's 2001 decision, Pet. App. D, and seek to bolster it by arguing, without citation, that the Looted Assets Class allocation was challenged by a *pro se* appellant and rejected by the Second Circuit. Supp. BIO at 6.

The party to which Respondents seemingly refer is *pro se* appellant Abraham Friedman, who was appointed *pro bono* counsel by the Circuit Court in 2001. A simple review of his brief in the Second Circuit shows that no such claim was raised. Brief of Appellant Abraham Friedman in *Friedman v. Union Bank of Switzerland*, 2001 WL 34117786, at 5. Rather, he challenged the competence of the entity chosen to distribute *slave labor* funds. *Id.* And a review of Respondents' own brief in response to Mr. Friedman likewise shows that Respondents recognized he did not challenge the Looted Assets allocation in 2001. *See* Brief of Plaintiffs-Appellees in Response to Appellant Abraham Friedman in *Lenini v. Union Bank of Switzerland,* 2001 WL 34117783, July 9, 2001, at *1.

Indeed, in the Second Circuit, Respondents' counsel was specifically pressed at oral argument on his claim that the Looted Assets Class allocation had been argued and decided in the previous appeal in that court in 2001, and conceded that it had not.

2. In their Supplemental BIO, Respondents also reiterate the claim that Petitioners acceded to the need-based allocation scheme, citing out of context a variety of statements by Petitioners where they strive to satisfy, for the benefit of U.S. Survivors, the district court's need-based criteria. Supp. BIO at 2-5. What Respondents neglect to mention is that such efforts by Petitioners were targeted at interim measures going to the *timing* of initial distributions, and Petitioners never abandoned their basic claim that the ultimate allocations needed to provide equal benefit to all class members, not merely the

needy. *See, e.g.* Letter from Samuel J. Dubbin, Esquire to the Honorable Edward R. Korman, July 23, 2002 ("[O]ur interim 'plan' is not the permanent insurance-based plan we hope to institute at the time of the secondary distribution, but is necessary given the time delays resulting from claims processing problems, and would undoubtedly advance the purpose for which the allocation appeals were prosecuted and honor the basis on which they were withdrawn.") [JA 6571-74]; September 10, 2003 Motion for Immediate Interim Distribution of Swiss Settlement Proceeds (request for assistance for those in need was "without prejudice" to claim that U.S. Survivors entitled to share of Looted Assets class funds "that reflects their proportion to the entire class of Survivors or Nazi victims worldwide.") [JA 6871].

Furthermore, once the district court rejected Petitioners' equal-benefit arguments and persisted in a need-based allocation scheme, Pet. App. F3-F5, the fact that Petitioners sought to *satisfy* the criteria imposed by the district court (which was the subject of the April 29, 2004 hearing) in no way abandoned or waived the consistent claim that such criteria were nonetheless unlawful. That was Petitioners' position in the Second Circuit, as described in Petitioners' Reply in Support of the Petition for a Writ of Certiorari, at 5-6.

Finally, Respondents' citation, Supp. BIO at 5, to the need-based distribution of funds in *Rosner v. United States of America,* Case No. 01-1859-Seitz (S.D. Fla.), the "Hungarian Gold Train" case, is actually very instructive. In *Rosner*, the parties' agreement to distribute settlement funds according to need was expressly noticed to the class and members were given the chance to opt out with full knowledge that the less-needy among them would not receive any funds. *Rosner*, September 30, 2005 Final Order and Judgment, at 10. *Rosner* thus is an example of class-members *voluntarily* electing to donate their shares to charity for the needy, with those who disagreed opting out. It is thus the precise opposite of this case, where the class was led to believe they would receive

some recovery and then told their funds instead would go to charitable purposes only *after* the time for opting out had passed. The issue here is whether a court can *force* class-members to contribute their shares of a recovery to charity, not, as in *Rosner*, whether class members can *affirmatively elect*, with full information, to engage in such charity.

CONCLUSION

For the foregoing reasons, and the reasons set forth in the Petition and Reply, this Court should grant certiorari.

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Respondents' Brief in Opposition (BIO) does not seriously dispute the requirements, as set forth by this Court and multiple courts of appeals, of intraclass equity, consideration for all class members relinquishing their claims, adequate information to decide whether to stay in or opt out, and adequate representation for all classes and subclasses by non-conflicted counsel. Nor does the BIO meaningfully dispute that the *cy pres* distribution scheme below fails to satisfy those requirements. Instead, it argues that this historic settlement is so unique that it should be exempt from traditional Rule 23 and due process requirements. But *especially* in an historic case such as this, there is a particular need for scrupulous application of this Court's established precedents, making certiorari here a valuable use of this Court's resources.

STANDING AND APPELLATE JURISDICTION

Respondents make several procedural arguments to create the illusion of a jurisdictional bar to Supreme Court review, based on alleged "standing" deficiencies and "untimeliness."

A. Petitioners Have Standing.

As Respondents now acknowledge and the Second Circuit held, Petitioner G.K., a Holocaust Survivor and class member, has standing. *See* BIO 1 n. 1; Pet. App. A23 n. 13. Her individual standing makes it unnecessary even to consider whether other Petitioners have standing, as the Second Circuit recognized in proceededing to the merits. *Id.*

To the extent Respondents attempt a further roadblock by attacking other Petitioners' standing, the argument that any Looted Assets Class member lacks standing to appeal is frivolous under *Devlin v. Scardeletti*, 536 U.S. 1 (2002).[1]

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[1] For example, Petitioner Leo Rechter, who appealed both individually and as President of the National Association of Jewish Holocaust Survivors (NAHOS, based in New York City), is a Looted Assets Class member whose family perished at the hands of the Nazis. [JA 7319-7326.]

The organizational Petitioners, represented in the Petition by their class-member officers and/or in their own name, are membership groups of Survivors (as their names make clear), and they likewise have standing given that their members are class members with standing, their purposes include securing proper restitution of stolen assets for their members, and the resolution of the allocation objections does not require individual members' participation. *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333 (1977). Petitioner Holocaust Survivors Foundation-USA, Inc. (HSF) is an umbrella organization whose members include individual Survivors and Survivor groups including those listed as Petitioners (and others). HSF has standing to the same extent as the individual Survivors and groups of which it is formed.[2]

B. This Appeal Was Timely and the Second Circuit Had Appellate Jurisdiction.

Equally without merit is Respondents' argument that the "need-based" distribution scheme challenged in the supplemental distributions was finally determined by the district court's initial allocation order of November 22, 2000, rendering this appeal from the subsequent order adopting that scheme for additional allocations untimely. BIO 2 n. 1.

First, contrary to Respondents' claims, BIO 5, 14-15, the Second Circuit did not previously uphold the *cy pres* distribution formula against the challenges raised by this Petition. Rather, the Second Circuit's 2001 opinion, Pet. App. D, only approved the use of *cy pres in general*, not the specific use of "need" as a factor or the flawed procedures leading up to that distribution scheme. *See* Pet. App. D3-D4.

Second, the distribution of each supplemental allocation of funds is a separate transaction that must be independently

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[2] HSF is a Delaware not for profit corporation approved under Section 501c3 of the Internal Revenue Code. Rechter Affidavit, at 4 and Exhs. 3-5. [JA 7322, 7347-68.] HSF member organizations include over forty groups from throughout the United States. [JA 7322-23, 7373-75].

justified and subject to independent objection and review. The Special Master's Report called for future allocations to be independently justified. *See* Special Master's Proposed Plan of Allocation and Distribution, September 11, 2000, at 136-37. [JA 807-08.] The District Court adopted the Special Master's recommendations in its November 22, 2000 order. Pet. App. C.[3] In fact, Respondents' claim that the Cross-Petition is unripe as to future allocations, Cross-BIO 12, flatly contradicts their claim in the initial BIO that subsequent allocation decisions such as the ones challenged here were predetermined by the initial allocation decision.

Because Petitioners correctly and timely appealed from the March 9, 2004 decision denying their Rule 59 motions, making the September 2002 and October 2003 allocation orders final, the Second Circuit had appellate jurisdiction.

REASONS FOR GRANTING THE WRIT

I. THE ISSUES PRESENTED ARE OF NATIONAL IMPORTANCE.

Rather than disputing the obvious national significance of this case, Respondents take the erroneous position that it is so "unique" it is simultaneously not constrained by prior precedents and not worthy of this Court's attention. BIO 16.

The *only* truly unique aspect of this case is that Petitioners are the victims of history's greatest crime against humanity – the Holocaust. For Respondents to argue that *Holocaust Survivors* have *less* protection under the Constitution and Federal

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[3] *See also* Brief Opposing the Holocaust Survivors Foundation USA, Inc.'s Opposition to the District Court's Allocation of the Settlement Fund, (Neuborne CA2 Brief), at 36 ("In connection with the subsequent application of the formula to interest earned on the settlement fund on September 25, 2002 and November 17, 2003, Chief Judge Korman invited and considered objections from interested persons, including Mr. Dubbin and HSF."); *id.*, at 26, 29-30 ("Special Master has carefully left open the prospect of an alteration in the allocation formula.").

Rules of Civil Procedure than would victims of securities fraud, antitrust violations, or consumer scams, is untenable.

Further, Respondents' attempt, BIO 11 & n. 8, to downplay the significance of the Petition by claiming that there will be "little or no residual funds" from the Deposited Assets fund to supplement the Looted Assets fund is another disingenuous diversion. To begin with, the $105 million supplemental allocations that are the immediate subject of this Petition are significant enough, standing alone, to warrant review, even if they are the last funds to be distributed.

And, despite Respondents' claims to the contrary, there is a substantial likelihood that more funds will be allocated to the Looted Assets Class in the future. Respondents' own exhibits demonstrate that there is an additional $425 million available for re-distribution to the Looted Assets Class, excluding interest. BIO App. M. Respondents' latest claim, Cross-BIO 5-6, that those excess funds will simply be given to members of the Deposited Assets Class who were *already* paid by re-valuing their claims upwards is speculative at best. The recommendation for such a sudden transparent scheme to burn through assets that would otherwise be allocated to the Looted Assets Class has not been accepted by the court, is subject to challenge in any event, and would exacerbate the due process concerns of the inadequate representation by Lead Counsel. The prospect of this Petition having substantial future effects, in addition to its substantial current impact, thus heightens the importance of granting certiorari.

II. THE SECOND CIRCUIT ERRED IN AFFIRMING DISTRIBUTION OF CLASS FUNDS BASED ON CRITERIA WHOLLY UNRELATED TO THE CLAIMS AT ISSUE.

Respondents would side-step Petitioners'Rule 23 and due process claims by arguing that none of this Court's and other circuits' conflicting decisions Petitioner cites involved class settlements distributed "based on need." *See, e.g.*, BIO i, 1. Such a tautological exercise hardly justifies the decision be-

low. The very questions presented by this Petition concern whether *need* is a permissible excuse for avoiding the intra-class equity and consideration principles set forth by this Court and numerous other courts. Pet.15-20.

The Looted Assets Class settlement fund is not a pool of money to be used for charitable purposes at the discretion of the district court, but rather is partial compensation for the looted and laundered *property* of all class members. Distribution based on current "relative need" unrelated to plaintiffs' legal claims is an important issue for this Court to resolve because it has potential applicability to *cy pres* distributions of virtually any class settlement, and is in conflict with well-established intraclass equity and consideration requirements.

A. This Court and Others Forbid Intraclass Disparities Based on Factors Unrelated to the Claims.

Respondents' circular argument that Petitioners cite no cases involving a *cy pres* distribution to the neediest members of a class simply begs the question. It also ignores the *cy pres* cases cited by Petitioner that forbid distributions benefiting only some class members and not others where the basis for class-members' claims are the same, *regardless* of which alternative and unrelated criteria are used to create the inequality. *See* Pet.17-18 (citing *cy pres* cases).

Respondents further argue that Petitioners "agreed" that the Looted Assets Class funds "should be distributed *cy pres* to the neediest class members." BIO 2, 21. But Petitioners *never* accepted that the Looted-Assets allocations were to be distributed to the "poorest" class members. *See* HSF Reply Brief in Appeal No. 04-1899, at 13-14 (record "confirms that the U.S. Survivors always asserted that *all* members of the Looted Assets Class have the same rights to recover and benefit from those funds. [Citations to Record]").

To be perfectly clear, it is and has been Petitioners' position that distribution of funds based on current need, unrelated to the claims being resolved, is unlawful. Period. Pet. i, 10,

14-15, 26-27. Petitioners do not endorse current need as a distribution criterion, whether applied across or within national boundaries.[4] They proposed various solutions such as having state insurance commissioners use settlement proceeds to fund an insurance policy that would be available to *all* survivors, not just the needy. Petitioners' position was and remains that the funds belong equally to all Looted Assets Class members. [JA 6571-74, 7263].

As only 4% of the Looted Assets funds were distributed for class members in the U.S., where 20% of the world's Holocaust Survivors and 30% of all Looted-Assets-Class members reside, the inequality of that distribution is obvious.[5]

B. This Court and Other Circuit Courts Forbid Settlements that Deny Class Members Consideration.

Respondent makes no effort to dispute that most class members in the U.S. will receive no consideration at all for the release of their Looted Assets claims. They candidly admit that once "relative need" became the sole criterion for distributing funds, it became "inevitable that most members of the looted assets class as a whole would not receive tangible benefits from the fund." BIO 21. It is not disputed, then, that the cases the Petition cites at 18-20 conflict with the decision below and support certiorari.

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[4] Any consideration of need by HSF went to the *timing* of distribution, not legal entitlement or total amount. Indeed, at the district court's and lead counsel's urging, U.S. Survivors withdrew their appeals of the initial allocation so as not to delay distribution of the shares for Eastern Europeans with urgent needs. [JA 7262-63.] But they did so on the understanding that the remainder of the class members who initially received considerably less than their proper share, including the U.S., would be brought back to parity with the proceeds from the next allocations.

[5] Respondents wrongly accuse Petitioners of claiming that "30% of all Holocaust survivors" reside in the U.S., BIO 17. The Petition accurately states that 30% of *class members* (including heirs) reside in the U.S. and that 20% of living *survivors* reside in the U.S. Pet. 8.

C. Distribution According to Class Members' Current Residence Would Benefit the Class as a Whole.

Contrary to the Second Circuit's and Respondents' suggestion, BIO 3 (quoting Second Circuit), Petitioners do not seek to benefit only a "'small group of needy survivors within a large nationwide survivor population,'" but rather seek an *equal* benefit for *all* class members, including those in the U.S. Under Petitioners' proposal for distributing Looted Assets Class funds according to the Survivors' current residence, the *entire class* or the *class as a whole* would have a greater opportunity to share in the settlement benefits.

III. THE PROCEDURES VIOLATED RULE 23 AND THE CONSTITUTION.

Despite the Second Circuit's approval of the procedures employed below, they conflict with established Supreme Court and circuit court precedents. As explained in the Petition, at 22-24, the bifurcated process denied class members the information needed to make an informed opt-out decision and then denied them any recovery after the opt-out deadline had passed. And, Lead Settlement Counsel's decision to redefine himself as counsel to the district court and the special master, thus abandoning his required loyalty to all class members, including those in the U.S., denied Petitioners adequate representation. Pet.24-29.

Respondents' claims of direct estoppel, issue preclusion, and laches, BIO 22, do not bar the claims here because the supplemental $105 million in allocations being challenged presented discrete causes of action from the initial allocation decision. *See supra* at 3-4. *Federated Department Store v. Moitie*, 452 U.S. 394 (1981), thus is not applicable here as that case involved the same cause of action, not a new one. The more apt authority is *Lawlor v. National Screen Service Corp.*, 349 U.S. 322 (1955), where this Court held that *res judicata* does not bar a subsequent action based on different facts even if it arises out of the same course of conduct.

"That both suits involved 'essentially the same course of wrongful conduct' is not decisive. Such a course of conduct – for example – an abatable nuisance – may frequently give rise to more than a single cause of action." *Id.*, at 328. The subsequent allocations of funds appealed here were not part of the initial settlement and final approval order and are no different than the successive claims this Court in *Lawlor* held were not barred by *res judicata* or collateral estoppel.[6]

The obvious reason neither the opt-out issue nor the inadequate representation issue was pursued in the 2001 appeal was because Lead Plaintiffs Settlement Counsel agreed, in writing, to support increased funding for Survivors in the United States when additional funds became available "with due regard for the fact that they had not received significant allocations up to [that] point." [JA 7284-85.] The appeals were withdrawn as a result of Lead Counsel's commitment. [JA 7044, 7322-23, 7262, 7450-54, 7854-58.]. Petitioners had every right to believe their objectives would be achieved without the need to pursue their appeals.[7]

Respondents' laches argument, BIO 23, also misses the mark. This case does not have any effect on prior distributions for which no objections were preserved or timely ap-

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[6] Even if the subsequent allocations were not separate transactions, *res judicata* would be defeated by the inadequate representation below. Pet. 24-29. As Justice Harlan observed: "The judgment in a class action will bind only those members of the class whose interests have been adequately represented by existing parties to the litigation." *Sam Fox Publishing Co. v. United States*, 366 U.S. 683, 691 (1961); *see also Stephenson v. Dow Chemical Co*, 273 F.3d 249, 260 (CA2 2001) ("Res judicata generally applies to bind absent class members except where to do so would violate due process. * * * Due process requires adequate representation 'at all times' throughout the litigation, notice 'reasonably calculated * * * to apprise interested parties of the pendency of the action,' and an opportunity to opt out."), *aff'd in relevant part*, 539 U.S. 111 (2003).

[7] Because none of the issues here were actually litigated and decided in the previously dismissed appeal, they cannot constitute collateral estoppel either. *Lawlor*, 349 U.S. at 867-68.

pealed. There is thus no possibility of undoing anything that has come before in any of the *other* classes. The only matters at stake now are the timely challenged supplemental allocations and any future allocations to the Looted-Assets Class.

Respondents argue that separate representation for each class would have been "economically wasteful" and "socially ruinous." However, there is no such exception under Rule 23, *Amchem*, and *Ortiz*, to the adequate representation requirement. This Court has held that due process requires adequate representation "at all times" throughout the proceedings. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985) ("the Due Process Clause of course requires that the named plaintiff *at all times* adequately represent the interests of the absent class members") (emphasis added).

Respondents also contend that Lead Counsel's loyalty to the special master and the court, as opposed to the Class, does not constitute a conflict under *Amchem*. This argument only sharpens the need for certiorari review by this Court. According to class action scholar Linda Mullenix, courts are in need of guidance from this Court as to the parameters of the conflicts proscribed in *Amchem* and *Ortiz*. Linda Mullenix, *Taking Adequacy Seriously: The Inadequate Assessment of Adequacy in Litigation and Settlement Classes*, 57 VAND. L. REV. 1687, 1743 (2004) ("[C]ourts need to develop more consistent jurisprudence concerning conflicts of interest that serve to disable a proposed class counsel or class representative from representing the class."). The dispute over whether Lead Settlement Counsel was conflicted here is precisely the type of uncertainty regarding adequacy of representation requiring resolution by this Court.

Finally, Respondents' repeated attempts, BIO 27-29, to distract from the gravity of the Petition by maligning the Survivors who have petitioned and the thousands of U.S. Holocaust Survivors they represent, as well as their counsel of re-

cord, are both inaccurate and irrelevant.[8] In contrast to Respondents' improper attacks on Petitioners and their counsel, Petitioners' citation to Lead Counsel's inadequate representation and misleading claims to *pro bono* status *are* relevant to the procedural questions raised in the petition. Pet. 27-30, and n. 17.[9]

CONCLUSION

This case is important given the historic nature of the claims, the magnitude of money involved, and the recurring significance of the legal questions and conflicts it presents. Moreover, this case will reflect profoundly upon the American court system's ability faithfully to apply the law to a case of such historic and moral importance. This case is eminently worthy of this Court's review.

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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[8] Petitioners' counsel will not take Respondents' bait and engage on the spurious attempts to impugn him and his Survivor clients. Petitioners note, however, that prior to the district court's March 9, 2004 Order denying the U.S. Survivors' objections to the supplemental allocations, Respondents' counsel and the district court viewed Petitioners' counsel as playing a constructive role in the case. *See* Letter from B. Neuborne to S. Dubbin, May 15, 2001 (committing to support increased future allocations to U.S. Survivors and praising efforts of Dr. Weiss) [JA 7284-85]; Neuborne Declaration in Support of Fee Request, July 21, 2003 (noting that Mr. Dubbin's insurance objections materially benefited the class). [JA 6861-63]. The subsequent and current attacks are thus best viewed as retaliation, not as meaningful reflections of reality.

[9] The fact that Judge Korman has now recused himself from Mr. Neuborne's fee request seems to *confirm* the conflict raised by Petitioners yet hardly *cures* that conflict as it affected Lead Counsel's *prior* behavior.

Respectfully submitted,

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